(26,024)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 557.

GUERINI STONE COMPANY, PETITIONER,

vs.

P. J. CARLIN CONSTRUCTION COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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1–4 United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1256.

P. J. CARLIN CONSTRUCTION COMPANY, Defendant, Plaintiff in Error,

v.

GUERINI STONE COMPANY, Plaintiff, Defendant in Error.

5 *Transcript of Record of District Court.*

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

At a District Court of the United States begun and holden at San Juan, Porto Rico, within and for the District of Porto Rico on the fifth Wednesday of May, being the 31st day of May, in the year of our Lord one thousand nine hundred and sixteen.

Before the Honorable P. J. Hamilton, District Judge.

No. 891. Law Docket.

GUERINI STONE COMPANY, Plaintiff,

—

P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Guerini Stone Company, plaintiff, v. P. J. Carlin Construction Company, defendant, a manifest error hath happened, to the great damage of the said P. J. Carlin Construc-
6 tion Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to

the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the City of Boston, Massachusetts, on the * 20th day of October next, in the said Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 21st day of August, in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.] ANTONIO AGUAYO,
Clerk of the District Court of the United States, District of Porto Rico.

Allowed by
P. J. HAMILTON,
District Judge.

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*Not exceeding 60 days from the day of signing the citation. Rule 14, Sec. 5.

Return of District Court on Writ of Error.

DISTRICT COURT OF THE UNITED STATES,
District of Porto Rico, ss:

And now, here, the Judge of the District Court of the United States, in and for the District of Porto Rico make- return of this writ by annexing hereto and sending herewith, under the seal
7 of the said District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, Antonio Aguayo, Clerk of said District Court of the United States, in and for the District of Porto Rico, have hereto set my hand and the seal of said Court this — day of November A. D., 1916.

—— ——, *Clerk.*

Complaint.

[Filed June 18, 1912.]

In the District Court of the United States for Porto Rico.

Law. No. 891.

GUERINI STONE COMPANY, Plaintiff,

vs.

P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

The plaintiff above named, by its attorney, E. S. Paine, Esq., complaining of the defendant alleges:

1. That the plaintiff is a corporation duly organized under and existing by virtue of the laws of the State of Massachusetts, and on information and belief, that the defendant is a corporation duly authorized under and existing by virtue of the laws of the State of New York.

8 2. That this defendant under date of December 16th, 1910, in the City of New York, State of New York, entered into a contract in writing with one A. Guerini, then doing business under the firm name of Guerini Stone Company, by which contract, said Guerini Stone Company obligated itself to do certain work and to furnish the labor, materials and supplies necessary for said work, as more fully set forth in said contract on the so-called Federal Building which was to be constructed in San Juan, Porto Rico, and whereby the said P. J. Carlin Construction Company agreed to employ the Guerini Stone Company in doing said work, and to make payment therefor as more fully set forth in said contract, a copy of which contract is attached to this complaint and hereby made a part thereof.

3. That thereafter, plaintiff corporation was organized under the Laws of the State of Massachusetts under the name of Guerini Stone Company, and that thereafter, said contract was duly assigned to this plaintiff and that this defendant thereupon consented in writing to said assignment and thereafter always recognized this plaintiff as the other party to the contract referred to.

4. That thereafter, during the month of February, 1911, at defendant's request, and in pursuance of the terms of said contract, this plaintiff employed and sent to Porto Rico its representatives, brought laborers from the United States and employed others in Porto Rico, organized its working forces, purchased and supplied the necessary tools and materials, prepared itself and was ready and willing to perform each and every obligation imposed on it by the terms of said Contract.

5. That thereafter, until the 16th day of October, 1911, this plaintiff was not permitted by this defendant to proceed with the work provided for by this contract owing to defendant's failure to provide the granite blocks necessary therefor. That on said day this plaintiff did proceed with said work with all possible diligence and performed all the work provided for by the said contract as fast

9 as this defendant in the course of construction work permitted this plaintiff to do so, and that this plaintiff duly complied with each and every obligation on it imposed by the terms of said contract.

6. That notwithstanding the entire readiness and preparedness of this complainant to proceed with its work, nevertheless, during the period from the 16th day of October,1911, to the 9th day of March, 1912, the work under the contract was unreasonably and unjustifiably delayed by the inexcusable default and failure of this defendant to provide necessary materials and to carry on its part of the construction work of said building, so as to permit of this plaintiff's performing the construction work required of it under the contract. And that plaintiff was thereby caused great damage by reason of continu-

ous delay and interruption in its work. That during said period, owing to defendant's defaults as above set forth, plaintiff was only able to work intermittently, and was unreasonably hindered and delayed, although plaintiff was at all times anxious and willing to proceed with all diligence and without interruption, all to the great damage of plaintiff, and in breach of defendant's obligations under said contract.

7. That on the 9th day of March, 1912, owing to the inexcusable default and failure of defendant to properly carry on its part of said contract, and owing to the inexcusable default and failure of this defendant to properly construct the foundation and other works in its charge, and to furnish and provide necessary material, all work of every nature was stopped on said building, and this plaintiff was prevented by defendant from continuing with any work whatsoever, and that said stopping of work has continued ever since, is still continuing, and, as plaintiff is informed and believes will continue for a period of at least several months hereafter, and that defendant has accordingly failed to comply with the obligations imposed on it by the contract herein set forth, and has committed a breach of its obligation- under the same, and that the result of said failure to comply with the terms of said contract has been, and is, to cause great damage and loss to this plaintiff, which has been obliged to keep its labor force on hand during all of said period at great loss and expense to plaintiff, and with the result that plaintiff cannot now continue with the work provided for it under the contract except at a great loss and damage, and that it will be impossible to complete the work provided for in said contract within the time set by its terms, nor within any reasonable extension of said time, nor within two years from this date.

8. Although plaintiff has always been ready and willing to comply with said contract the defendant has failed and refused as aforesaid to permit it so to do.

9. That plaintiff has well and properly performed under the terms of said contract, a large amount of work, and has done all of said work which defendant has permitted it to do or that could be done at the stage of construction reached by the defendant in the work done by it, and that by the terms of said contract, payment of not more than 85 per cent of the amount of the work actually done was due and payable by this defendant monthly on twelve days' notice from plaintiff to defendant and that plaintiff during the months of December, 1911, January and February, 1912, duly notified and demanded of defendant payment in accordance with the contract of the sums due for the work actually performed, but that the defendant has continuously and repeatedly failed and refused to make said payments and accordingly, has committed a breach of its obligations under the terms of the contract.

10. That under date of May 22d, 1912, plaintiff notified defendant in writing of its election to cancel or rescind said contract and to bring its action for damages for breach thereof.

11. That plaintiff heretofore has offered to the defendant to sub-

mit the differences arising out of the facts herein set forth to arbitration, but that defendant has always refused so to do.

12. That plaintiff, at defendant's request has furnished and supplied work, labor and materials in and about the construction of the Federal Building at San Juan, Porto Rico, of the fair, reasonable and agreed value of $45,237.00, which sum has been duly
11 demanded of defendant and no part of which has been paid except the sum of $4,439.55, and that defendant is justly indebted to plaintiff in the sum of $40,797.45.

13. That plaintiff had been damaged in the sum of $35,525.00, which amount has been actually expended by it to date in and about the furnishing of work, labor and material provided for by the said contract, and has been damaged in the additional sum of $5,000.00 by reason of loss of time, waste of material and damage to equipment caused by the delay above set forth and that plaintiff has also been damaged in the sum of $9,712.00, the same being the amount of profits which plaintiff would have made if defendant had complied with the terms of its contract, and that no part thereof has been paid by defendant to date, except the sum of $4,439.55.

Wherefore, plaintiff demands judgment against the defendant in the sum of $50,237.00, together with interest thereon from the date of filing this action together with the costs of this action.

(Signed) E. S. PAINE,
Attorney for Plaintiff.

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

George Follett, being duly sworn, deposes and says that he is the manager and attorney in fact of plaintiff corporation in Porto Rico, that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

(Signed) GEORGE FOLLETT.

Sworn to and subscribed before me this 18th day of June, 1912, by George Follett, of age, married, resident of San Juan, by occupation agent, to me personally known.

[SEAL.] RAFAEL GUILLERMETY,
Clerk Dist. Court U. S. for P. R.,
By N. V. COLBURN, Deputy.

File No. —.

12 EXHIBIT ATTACHED TO COMPLAINT.

Articles of Agreement.

Made the Sixteenth day of December in the year one thousand nine hundred and Ten.

By and between P. J. Carlin Construction Company, parties of the first part (hereinafter designated the General Contractors) and

Guerini Stone Co. party of the second part (hereinafter designated the Sub-Contractor).

Witnesseth that the Sub-Contractor being the said party of the second part, in consideration of the covenants and agreements herein contained on the part of the General Contractors, being the said parties of the first part, does covenant, promise and agree with the said General Contractors, in the manner, that is to say:

1st. The Sub-Contractor shall and will well and sufficiently perform and finish in a thoroughly workmanlike manner under the direction and to the satisfaction of the General Contractors and James Knox Taylor, Architect (acting as Agent of the Owner), or his, or its representative.

To furnish and set in position, including the concrete backing, all the imitation of Sand Stone, and to construct the interior concrete floors, concrete roof, backing the granite construction, enclosing all the I beams, for and at the San Juan Post Office Building, at San Juan, Porto Rico agreeable to the drawings and specifications, made by the said Architect (copies of which have been delivered to the Sub-Contractor), and to the dimensions and explanations thereon, therein and herein contained, according to the true intent and meaning of said drawings and specifications, and of these presents, including all labor and materials incident thereto, and shall provide, at his own expense, all scaffolding, implements, moulds, models, hoisting and cartage necessary for the due performance of the said work or works.

2nd. The Architect or the General Contractors shall furnish
13 to the Sub-Contractor drawings and explanations necessary to detail and illustrate the work to be done, and the Sub-Contractor shall conform to the same as part of this Contract, and in the event of any doubt or question arising respecting the true meaning of the drawings and specifications, the decision of the Architect thereon shall be final and conclusive. It is mutually understood and agreed that all drawings and specifications are to remain the property of the Architect and upon the completioon of the work, are to be delivered to the General Contractors.

3rd. No alterations shall be made in the work of materials shown or described by the drawings and specifications, except upon a written order of the General Contractors, and when so made, the value of the work and materials added or omitted shall be computed and determined by the General Contractors, and the amount so determined shall be added to or deducted from the contract price, as hereinafter provided. In the case of dissent of either hereto from such determination of the General Contractors the valuation of the work and materials added or omitted shall be submitted to two disinterested Arbitrators, one to be appointed by each of the parties to this contract, and the Arbitrators so chosen shall, if themselves unable to agree, choose a third without unnecessary delay, and the decision in writing signed by those assenting thereto of any two of the Arbitrators, shall be final and binding on the parties hereto, and each of the parties shall pay one-half of the expenses of such reference. The determination and adjustment in the manner aforesaid

of the value of any work or materials to be added to or deducted from the contract price, shall be a condition precedent to the right to demand and receive the value of any additional or extra work and materials, or to demand and have deducted from the contract price the value of any omitted work and materials, and no action will lie for the value thereof until the condition has been performed.

4th. The Sub-Contractor shall provide sufficient safe and proper facilities, at all times, for the inspection of the work by the Owner, Architect and General Contractors, or the authorized representatives of either of them, and must, upon request of the General Contractors, produce all vouchers showing quality of material used. The Sub-Contractor shall within twenty-four hours after receiving written notice from the General Contractors to that effect, at his own cost and expense proceed to remove from the grounds or building all materials condemned by the Architect or General Contractors whether worked or unworked, and to take down all portions of the work which the Architect or General Contractors shall, by like written notice, condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications. Work done or materials furnished by any Sub-Contractor and not approved by the Architect and General Contractors shall not be accepted.

5th. Should the Sub-Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality and quantity, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on his part herein contained, the General Contractors shall be at liberty, after three days' notice to the Sub-Contractor to provide any such labor or materials, and to deduct the cost thereof from any money due or thereafter to become due to the Sub-Contractor under this Contract; and the General Contractors shall also be at liberty to terminate the employment of the Sub-Contractor for the said work, and to enter upon the premises and take possession of all materials and appliances of every kind whatsoever thereon, and to employ any other person or persons to finish the work and to provide the materials therefor; and in case of the discontinuance of the employment of the Sub-Contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expenses incurred by the General Contractors in finishing the work, such excess shall be paid by the General Contractors to the Sub-Contractor, but if such expense shall exceed such unpaid balance, the Sub-Contractor shall pay the difference to the General Contractors. The expense incurred by the General Contractors as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate shall be conclusive upon the Parties.

6th. The Sub-Contractor shall and will proceed with the said work, and every part and detail thereof in a prompt and diligent manner,

and shall and will do the several parts thereof at such times and in such order as the General Contractors or Architect may direct, and shall and will wholly finish the said work according to the said drawings and specifications, and this contract in 300 days from the date upon which the building is ready to receive his work and after he has been notified to proceed by the General Contractors, and, in default thereof the Sub-Contractor, shall pay the General Contractors the sum of Twenty Dollars for every day thereafter that the said work shall remain unfinished as and for liquidated damages. The Sub-Contractor further agrees to begin work at the Building within three days from the time that he is notified by the General Contractors that the building is ready to receive such work.

7th. The Sub-Contractor shall not cause any unnecessary hinderance or delay to other contractors on said buildings and shall bear all damages done to the work of such other contractors, by his employes. Should the Sub-Contractor be obstructed or delayed in the prosecution or completion of the work by neglect, delay or default of the Owner, the Architect, the General Contractors or of any other contractors employed by them upon the work, or by alterations which may be required in said work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the employees through no fault of the Sub-Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be made unless a claim thereto is presented in writing to the General Contractors within twenty-four hours after the occurrence of such delay. The General Contractors shall award and
16 certify in writing, the amount of additional time to be allowed. The Sub-Contractor may appeal from such award to arbitrators constituted as provided in Article 3rd of this Contract.

8th. The General Contractors will not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said works, or any part or parts thereof respectively or for any of the materials or other things used and employed in finishing and completing the said works; or for injury to any person or persons, either workman or the public, or for any damage to adjoining property for any cause which might have been prevented by the Sub-Contractor or his workman, or by anyone employed by him, nor will the General Contractors be answerable or accountable for violation of any letters patent or patent rights, or any infringement thereof by the Sub-Contractor, or by reason of the use by the Sub-Contractor of any art, machine, manufacture or composition of matter on said works in violation of any patent right or rights, or infringement thereof, against all of which injuries and damages to persons and property the Sub-Contractor having control over such work must properly guard and hold the General Contractors harmless and must make good all damage from whatever cause, being strictly responsible for the same. Where there are different contractors employed on the works, each shall be responsible

to the other for all damage to work, to persons or property or for loss caused by neglect by failure to finish work at proper time and preventing each portion of the works being finished by the several Sub-Contractors, in the time named in this contract for completion, or from any other cause; and any Sub-Contractor suffering damage shall cause the attention of the General Contractors to the same, for action as laid down in Article 3rd of this Contract.

9th. The Sub-Contractor shall, at his own cost and expense, apply for and obtain all necessary permits and the Sub-Contractor further agrees that all work performed and all materials furnished by him under this contract shall comply strictly with the laws and
17 ordinances in force in the locality in which the building is erected, and that he will comply promptly with all ordinances, regulations, rules and orders of the City Government and of any and all of its departments and bureaus, and that he will so perform said work and furnish said materials in accordance with such laws and ordinances, and so comply with such ordinances, regulations, rules and orders whether the work and materials for the same are or are not included and provided for in the plans, drawings and specifications; and all such work and materials made necessary by such laws, ordinances, regulations, rules and orders in order to complete the work contemplated in this contract shall be performed and furnished without extra charge or expense to the General Contractors. The Sub-Contractor will be responsible for a violation of any such laws, ordinances, rules and orders and will indemnify the General Contractors for any loss or damage resulting to them by reason of such violation.

10th. Should the proper, workmanlike and accurate performance of any work under this contract depend in any way upon the proper, workmanlike or accurate performance of any work by another contractor on said building, the Sub-Contractor agrees to use all means necessary to discover any defects in such contractor's work, and to report the same in writing to the General Contractors before proceeding with his work which is so dependent; and shall allow the General Contractors a reasonable time in which to remedy such defects, it being the intention of the parties hereto that the entire work on said building shall be properly performed in a workmanlike manner.

11th. The General Contractors will provide all labor and materials not included in this Contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Sub-Contractor, agree that they will reimburse the Sub-Contractor for such loss; and the Sub-Contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the General Contractors
18 shall become liable, then he shall make good to the General Contractors any such damage over and above any damage for general delay herein otherwise provided; the amount of such loss or damage, in either case, to be fixed and determined by the Architect, or by arbitration as provided in Article 3rd in this contract.

12th. It is hereby mutually agreed by the parties hereto that the sum to be paid by the General Contractors to the Sub-Contractor for said work and materials shall be Sixty-four Thousand Seven Hundred and Fifty Dollars (64,750.00) subject, to additions or deductions as hereinbefore provided, and that such sum shall be paid in current funds by the General Contractors to the Sub-Contractor in monthly payments on account, not to exceed in amount 85% of the cost of the work actually erected in the building, provided that the Sub-Contractor furnishes to the General Contractors a written requisition, on a form to be supplied by the General Contractors, not less than twelve days before payment is required, it being understood that the final payment shall be made within forty days after this contract has been completely performed and all drawings, plans and specifications have been returned to the General Contractors by the Sub-Contractor; and provided before each payment, if required, the Sub-Contractor shall give the General Contractors good and sufficient evidence that the premises are free from all liens and claims chargeable to the Sub-Contractor; and further that if, at any time, there shall be any lien or claim or conditional contract for which, if established, the General Contractors on the said premises might be made liable, and which would be chargeable to the said Sub-Contractor, the General Contractor shall have the right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify against such lien or claim, until the same shall be effectually satisfied, discharged and cancelled, and if there should prove to be any such claim after all payments are made, the Sub-Contractor shall refund the General Contractors all monies which the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the former's default.

19 13. It is further mutually agreed between the parties hereto that no payment made under this contract, shall be conclusive evidence of the performance of this contract, either wholly or in part against any claim of the General Contractors and no payment shall be construed to be acceptance of any defective work.

14th. In case the nature of the damages or defects of any particular work or works is such that in the judgment of the General Contractors it is not expedient to have the work corrected, the General Contractors shall have the right to take such sums of money from the amount due to the Sub-Contractor, on the final settlement of the accounts as the General Contractors consider a fair and reasonable renumeration for the difference in value of the material or work furnished from that specified or for the damage to the complete work.

15th. The Sub-Contractor will insure the work to cover his interest in the same from time to time; and for any loss of the Sub-Contractor by fire the General Contractors will not, under any circumstances, be answerable or accountable; but the general Contractors may protect the works at their option, by insurance to cover their interest when payments have been made to the Sub-Contractor.

16th. The Sub-Contractor is to furnish a competent representative

who is to be kept constantly on the ground to represent the Sub-Contractor for the purpose of receiving notices, orders and instructions. The Sub-Contractor is also, when called upon by the General Contractors to report the general progress of the work at the building or elsewhere.

17th. In case of day work all vouchers for same are to be delivered to the General Contractors at latest during the week following that in which the work may have been done, and only such day work is to be allowed for as such as may have been authorized by the General Contractors in writing to be so done.

18th. The Sub-Contractor further agrees in all cases of additions and deductions, omissions or substitutions to charge or credit
20 the amount of same at market rates, and to furnish unit prices for all items required by the General Contractors.

19th. The Sub-Contractor shall not let, assign or transfer this contract, or any interest therein, without written consent of the General Contractors.

20th. The Sub-Contractor shall make no claim for additional work unless the same shall be done in pursuance of written order from the General Contractors, and notice of all such claims shall be made to the General Contractors in writing before the next ensuing payment, or shall be considered as abandoned by the Sub-Contractor.

21st. Wherever notice in writing to be given to Sub-Contractor is herein provided for, a notice mailed to the last known address of the Sub-Contractor shall be sufficient.

22d. The Sub-Contractor further agrees not to display on or about the premises any sign, trade-mark or other advertisement.

23. The Sub-Contractor further agrees to guarantee his work and to make good without cost to the owner or General Contractors, any and all defects which may appear during the time specified by the General Contractors in the guarantee.

24th. The Sub-Contractor further agrees that all disputes arising between himself and his employees shall be adjusted according to the joint arbitration plan of the Building Trades Employers' Association and the representatives of the Unions, as set forth in the document of July 9, 1903.

25th. The Sub-Contractor further agrees to Furnish the material and build the concrete footing complete to the basement floor for the sum of $6.70 a cubic foot.

Also to furnish the materials and build all the sidewalks for the sum of $1.85 a square yard.

Also set in position all the granite walls, steps, balusters, buttresses and curbing, and all other granite work, fot the sum of 40¢
21 a square foot surface. The three above items to be at the option of the General Contractor.

If Reinforced Concrete is substituted for steel beams, the price will be the same. All the reinforcement and all anchors will be provided by the steel contractor.

The General Contractor agrees to furnish two derricks complete, and one engine, the Sub-Contractor to pay for all costs of operating

same when used by him. It is further understood that if the Government accepts granite imitation for the granite in the base, the Sub-Contractor agrees to furnish materials and set in position, including the backing, all the imitation granite or casting, and for the further sum of Twenty Thousand Eight Hundred and Seventy-nine Dollars ($20,879).

It is agreed that a satisfactory bond in the sum of $15,000.00, acceptable to the General Contractors will be furnished by the Sub-Contractor.

And the said General Contractors hereby promise and agree with the said Sub-Contractor to employ, and do hereby employ him to provide the materials and to do the said work according to the terms and conditions herein contained and referred to for the price aforesaid, and hereby contract to pay the same at the time, in the manner and upon the conditions above set forth.

And the said parties for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

In Witness Whereof, the parties to these presents have hereunto set their hand- and seals, the day and year first written above.

P. J. CARLIN CONSTRUCTION CO.
J. P. CARLIN, *Secretary.*
GUERINI STONE CO.
A. GUERINI.

In the presence of
K. M. ZINK.
K. M. ZINK.

22 *Answer.*

[Filed July 29th, 1912.]

In the District Court of the United States for Porto Rico, Sitting at San Juan.

No. 891. Law.

GUERINI STONE COMPANY, Complainant,

vs.

P. J. CARLIN CONSTRUCTION CO., Defendant.

Defendant, P. J. Carlin Construction Company, by its Attorney, Francis H. Dexter, for answer to the complaint herein filed says:

(1) It admits that plaintiff and defendant are corporations organized and existing respectively in the manner described in the complaint herein.

(2) Defendant admits the execution of the contract by and between A. Guerini and defendant on the 16th day of December, 1910, as in the said complaint alleged, and for greater certainty as to the contents thereof defendant refers to the original copy thereof which is made a part of this answer.

(3) Defendant admits the assignment of said contract by said A. Guerini to plaintiff and the consent of defendant thereto as in the third paragraph of the complaint alleged.

(4) Defendant admits that during the month of February, 1911, plaintiff did employ and send to Porto Rico, certain of its representatives and laborers and that plaintiff employed some other laborers in Porto Rico, purchasing and supplying certain tools
23 and materials for the performance of the obligations assumed by said plaintiff in and by the contract above referred to.

(5) Defendant specifically denies that after the month of February, 1911, and until the 16th day of October, 1911, plaintiff was prevented by defendant from proceeding with, and carrying on the work provided for by said contract owing to defendant's failure to provide granite blocks, or for any other reason, and defendant denies that plaintiff proceeded with the performance of the work provided for in and by said contract, and denies that plaintiff has complied with the terms of said contract as alleged in paragraph 5, or at all.

(6) Defendant specifically denies that during the period from the 16th of October, 1911, to the 9th of March, 1912, the work under the said contract was unreasonably and unjustly delayed by the inexcusable default and failure of defendant to provide necessary materials, and to carry on its part of the construction work of said building, and defendant denies that plaintiff has been caused damage by reason of continuous delay and interruption in its work, or for any other reason in connection with the things to be done and performed under the said contract.

(7) Defendant specifically denies that on the 9th of March, 1911, or at any other time the work on said building was stopped on account of the inexcusable default and failure of defendant to properly construct a foundation and other works in charge of defendant or to furnish and provide necessary materials and defendant specifically denies that the said work will be delayed for several months because of said alleged inexcusable default and failure of defendant, and defendant further specifically denies that it has committed any breach of its obligations in the contract aforesaid, or that plaintiff has been damaged by reason thereof.

(8) Defendant denies that plaintiff has at any time since the execution of said contract been ready and willing to comply with the terms thereof.

(9) Defendant specifically denies that plaintiff has done or
24 performed any work under the said contract for which it has not received due payment, with the exception of a small amount of money for work done since the last settlement and not exceeding a few hundred dollars.

(10) Defendant says that it is true as alleged in paragraph 10 of the complaint that plaintiff notified defendant of its election to

cancel or rescind said contract and to bring its action for damages for the alleged breach thereof, but defendant says that said action of plaintiff was only for the purpose of attempting to cover up and to serve as a blind for its own shortcomings and default in the performance of the said contract.

(11) Defendant denies that it has refused to submit to arbitration the differences arising between the parties hereto under the said contract and avers that it has been at all times ready and willing to submit the same to arbitration in accordance with the terms of said contract.

(12) Defendant specifically denies that plaintiff has supplied work, labor and materials in and about the construction of the said Federal Building of a fair, reasonable and agreed value of $45,237.00, and defendant avers that the value of the work, labor and materials furnished and actually placed by plaintiff in and about said building amounts only to the sum of $4,439.55 which amount has been paid by defendant to plaintiff and received by the latter in full satisfaction for all work and materials furnished and put in place by it, with the exception of the small sum, as above mentioned representing services performed since the last settlement.

(13) Defendant specifically denies that plaintiff has been damaged in the sum of $35,525.00, or in any other sum on account of money expended by it in and about the furnishing of work, labor and materials provided for by said contract or for any other cause in connection therewith, and defendant further denies that plaintiff has been damaged in the sum of $5,000.00 by reason of loss of
25 time, waste of material and damage to equipment caused by the alleged delay of defendant, and defendant further denies that plaintiff has been damaged in the sum of $9,712.00 for or on account of profits expected or otherwise, and defendant denies that plaintiff has been damaged in any sum whatsoever by defendant on account of the matters and things set forth in the said complaint.

(14) Defendant further answering the said complaint says that the sub-contract as aforesaid between plaintiff and defendant was and is subject to all the terms and conditions of an original and principal contract executed between defendant and the Government of the United States of America, by its duly constituted authorities on the — day of December, 1910, providing for the construction in the City of San Juan of a so-called Federal Building.

(15) And defendant avers that the work and materials to be performed and furnished in and about the construction of said building were and are subject to the absolute regulation, control, approval, and acceptance of the duly authorized representatives of the Federal Government.

(16) Defendant avers that it has at all times proceeded strictly in accordance with the terms and conditions of the said original contract made by it with the Federal Government and has been governed in the performance of work and the furnishing of material either by it, or by the said sub-contractor, plaintiff herein by the orders of the said representatives of the Federal Government.

(17) Defendant says that during the course of the construction

of the said Federal Building the representatives of the said Federal Government found it desirable or necessary to change the plans for and the manner of construction of the foundations for the said building and that said action of the Federal Government was within the terms and rights conceded to it by the original contract made between it and defendant; defendant avers that plaintiff was equally ready with defendant to, accept such action upon the part of the Federal Government.

26 (18) Defendant further avers that plaintiff improperly and wrongfully has endeavored and attempted to take advantage, without the sanction of law, of this circumstance to cover up and excuse its own shortcomings and default in the performance of the obligations assumed by plaintiff in its sub-contract with defendant.

(19) Defendant avers that as set forth in the counterclaim accompanying this answer, plaintiff has failed and neglected to carry out the terms of the sub-contract which it has entered into with defendant and has without right or reason declined to carry on the work and to furnish the materials required under the sub-contract entered into with defendant.

Wherefore, defendant prays judgment with all costs.

Counter-claim.

Defendant P. J. Carlin Construction Company, by way of counterclaim against plaintiff says:

1. That notwithstanding the obligations assumed by plaintiff in the said sub-contract entered into with defendant on the 16th day of December, 1910 for the furnishing and setting in position, including the concrete backing, of all the imitation of sandstone, and to construct the interior of concrete walls, concrete floors, concrete roof, backing the granite construction, enclosing all the I-beams, and various other labor and materials as in said sub-contract specified, plaintiff has without good or sufficient cause failed and refused and still refuses to carry on and perform the said work and to furnish such materials for which it was to receive the sum of $64,750.00.

2. By reason of the failure and refusal of plaintiff as aforesaid to perform the terms and conditions of said sub-contract, defendant will be obliged to perform the said work and to furnish such material at a cost in excess of the said sub-contract price of more than $40,000.00.

3. By reason of the wrongful and improper conduct of
27 plaintiff defendant is damaged in the sum of $40,000.00 for which amount defendant prays judgment against plaintiff with all costs.

(Signed) F. H. DEXTER,
Attorney for Defendant.

John J. Carlin, being duly sworn upon his oath, says that he is Vice-President of the P. J. Carlin Construction Company and that the facts set forth above are true as he verily believes.

JOHN J. CARLIN,
Vice-President.

Subscribed and sworn to before me this 29th day of July, 1912.

[SEAL.] RAFAEL GUILLERMETY,
Clerk Dist. Court of U. S. for P. R.

Bill of Particulars.

[Filed October 30, 1912.]

Materials, supplies, equipment, work, labor, salaries, and payrolls supplied or expended on Federal Building, apparatus, tools, molds and other appliances necessary for and used solely in connection therewith, all performed, furnished or expended in accordance with contract between February, 1911, and date....	$35,525.00
Damages by reason of detention, deterioration and loss of equipment, loss of time of officers of plaintiff Company, not chargeable to salary nor included above, all between February, 1911, and date.....	5,000.00
28 Anticipated profits, being difference between amounts chargeable as per contract and estimated actual cost.....	9,712.00
Total	50,237.00

E. S. PAINE,
Attorney for Plaintiff.

Copy received Oct. 30, 1912.

Amended Complaint.

[Filed November 2, 1912.]

Now comes the plaintiff above named and amends its complaint heretofore filed herein, as follows:

By striking out paragraph marked 10 of said Complaint and inserting in its stead the following:

"10. That because of said repeated violation and breach of said contract on the part of the defendant, plaintiff, under date of May 22d, 1912, notified defendant in writing of its election to terminate said contract and to bring its action for damages for breach thereof."

By striking out the figures "$50,237.00" in the next to the last line of said Complaint, and inserting in their stead the figures $45,797.45.

San Juan, Porto Rico, November 1st, 1912.

E. S. PAINE,
Attorney for Plaintiff.

29 *Amended Bill of Particulars.*

[Filed November 9, 1912.]

Labor payroll paid at San Juan Office	$11,687.21
Labor payroll paid at Boston office	2,794.56
Salary and expenses of G. A. Follett, Local Agent	2,893.85
Freight Bills and passage fares paid at Boston Office to N. Y. & P. R. S. S. Co	1,117.23
Passenger fares paid from San Juan Office	710.00
Lumber & Hardware	3,667.53
Broken Stone	1,960.87
Cement and Plaster	2,843.05
Electricity	401.51
Invoices paid from Boston Office	1,135.14
Rent of Tools and Machinery	5,805.00
Sand purchased and delivered	419.96
Freight, express and cartage paid at San Juan Office	121.28
Miscellaneous expenses	631.69
Value of tools and machinery converted by defendant.	3,500.00
Value of time of Mr. Converse, president, 66 days devoted to visit to Porto Rico on this contract at $25.00 per day	1,650.00
Value of time of Mr. Converse, president, 4 days devoted to visits to New York City at $25.00	100.00
Anticipated profits from performance of contract	9,712.00
	$51,150.88

Cr.

Cash from Defendant on contract	$3,765.50	
Cash from Defendant on contract	674.05	
Cash from Defendant for shed sold.	65.00	
30 Cash for outside work	710.00	
Cash for lumber sold	243.01	
	$5,457.56	
Balance		$45,693.32

San Juan, P. R., November 9th, 1912.

(Signed) E. S. PAINE,
Attorney for Plaintiff.

Service of copy acknowledged this — day of November, 1912.

——— ———,
Attorney for Defendant.

I hereby certify that I personally served a copy of the above Bill by leaving a copy thereof on the desk of Attorney for defendant in

his office, there being no one there to receive the same, at 11:20 a. m., Sat., Nov. 9, 1912.

(Signed) E. S. PAINE,
Attorney for Plaintiff.

Plaintiff's Amendment to Bill of Complaint.

[Filed November 13th, 1912.]

Now comes the plaintiff herein and amends its bill of complaint herein before filed as follows:

By striking out paragraph 13 thereof, and inserting in its place the following:

That plaintiff has been damaged by outlays and disbursements made by it, in and about the furnishing of work, labor and materials and expense provided for said contract $38,670.87.

In time and services devoted to the contract by the president of the plaintiff corporation $1,750.00.

In loss of anticipated profits which plaintiff would have made if defendant had complied with the terms of its contract, $9,712.00.

31 And that no part thereof has been paid, except the sum of $4,439.55.

Wherefore plaintiff demands judgment against the defendant in the sum of $45,693.32.

E. S. PAINE,
Attorney for Plaintiff.

Service of copy acknowledged this — day of November, 1912.

——— ———,
Attorney for Defendant.

Amendment of Answer.

[Filed June 1, 1916.]

Defendant, P. J. Carlin Construction Co. respectfully prays leave of the Court to amend paragraph of the Answer by adding thereto the following:

"Which said original contract was by the agreement and understanding of the parties to the sub-contract adopted as and made a part of the latter, subsequent to the execution of said sub-contract and for and upon mutual consideration accruing to the said parties."

San Juan, P. R., June 1st, 1916.

FRANCIS H. DEXTER,
Attorney for Defendant.

Joseph P. Carlin, being duly sworn upon his oath — that he is the President of the Defendant Company and that the facts set forth above are true.

JOSEPH P. CARLIN.

Subscribed and sworn to before me this 1st day of June, 1916.
[SEAL.] ANTONIO AGUAYO,
Clerk U. S. District Court.

32 *Clerk's Record of Verdict and Judgment.*

In the District Court of the United States for Porto Rico.

[June 8th, 1916.]

Law. No. 891.

GUERINI STONE CO.
vs.
P. J. CARLIN CONSTRUCTION CO.

This day come the jury into Court in charge of the United States Marshal and in response to the question of the Court in that regard, say that they have agreed upon a verdict and hand the Court a sealed verdict which is opened and is as follows:

Law. No. 891.

GUERINI STONE CO.
vs.
P. J. CARLIN CONSTRUCTION COMPANY.

Verdict.

"We, the jury, find for the plaintiff and assess their damages in the sum of $35,873 *Dollars* and .09 cents with interest.
NEWTON L. REED, *Foreman.*"

Whereupon upon motion of Attorney for plaintiff the Jury is instructed by the Court to retire to their room again to figure out and to state in their verdict the amount of interest they find, whereupon the jury retire and thereafter returns into Court the Verdict as follows, to wit:

33 Law. No. 891.

GUERINI STONE CO.
vs.
P. J. CARLIN CONSTRUCTION COMPANY.

Verdict.

"We, the jury find for the plaintiff and assess their damages in the sum of $35,873 *Dollars* and .09 cents with interest $8,609.54, Total, $44,482.63.
NEWTON L. REED, *Foreman.*"

which verdict is read by the Clerk and Jury being asked if that is their verdict they all answered that "it is." Thereupon the Clerk is directed to file and enter of record the verdict and the jury is discharged from further consideration of the case.

Judgment.

It is therefore considered and adjudged by the Court that the plaintiff herein Guerini Stone Company, do have and recover from the defendant, P. J. Carlin Construction Co. the sum of Forty-four thousand four hundred eighty-two Dollars sixty-three cents ($44,-482.63) with interest thereon at 6 per cent from this date until paid and the costs of the suit to be taxed.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico, do hereby certify that the foregoing is a true copy of the original journal entry in the case entitled therein of record in my office under date of June 8th, 1916.

34 Witness my official signature and the seal of said Court at San Juan in said District this 17th day of August, A. D., 1916, and in the 141 year of the Independence of the United States of America.

[SEAL.] ANTONIO AGUAYO, *Clerk*,
By FIDELINA AGUAYO, *Deputy*.

Defendant's Bill of Exceptions.

[Filed and Allowed November —, 1916.]

District Court of United States, District of Porto Rico.

No. 891. Law.

GUERINI STONE COMPANY, Plaintiff,

against

P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

Be it remembered that at a term of said District Court of the United States for Porto Rico, held in the City of San Juan on the — day of May, 1916, a cause therein pending, wherein Guerini Stone Company, a corporation organized and existing under the laws of the State of Massachusetts was plaintiff, and P. J. Carlin Construction Company a corporation organized and existing under the laws of the State of New York, was defendant came on to be tried on the 31st May, 1916, before the Honorable P. J. Hamilton, Judge of said

Court, at which time came the said parties, by their respective attorneys, Edward S. Paine, and Frances E. Neagle, for the
35 plaintiff, and F. H. Dexter and John C. Wait for the defendant, and thereupon, the said issues joined between the parties, came on to be tried, and the jurors of the jury, whereof mention is made in the record, being called likewise came and were sworn to try the said issues upon the merits of said cause in manner aforesaid joined.

The Court: (After the opening statement of counsel for the defendant to the jury.) Gentlemen of the Jury, it seems that this is a suit which has been before this Court before and was tried some three years ago or more. Now that is a fact which I know and you know. It has been stated to you. But this case is to be tried entirely upon what is brought before you at this time. It makes no difference whatever who won in the case before or who lost in said case. The plaintiff has to prove his case this time just as if it was a brand new case. It is quite possible that the evidence will be entirely different between the two trials, so I simply wish to ask you to pay no attention to the fact that there was a previous trial and necessarily that the jury found or did not find one way or the other. You are not to try the preceding case. You are to try the case before you now.

Mr. Paine: I will call the Court's attention to the fact that the diversity of citizenship of the parties is admitted by the pleadings so that no formal proof is necessary on that point, and also that the execution of the contract is admitted so that I can offer the contract in evidence without identifying it.

The Court: I would be glad to hear from counsel if those facts are agreed.

Mr. Dexter: Yes, sir.

The Court: They will be considered then as in the case without any further proof.

Mr. Paine: I understand there is a rule of Court, which, unless modified by consent or by your Honor, requires me to put on first as a witness any party that I intend to call. Of course, I have no party. The plaintiff is a corporation. If your Honor will allow me, I would like to put on Mr. Follett first, who was the superintendent on the ground, and later to put on Mr. Converse. If your Honor will allow me to follow that order.

36 The Court: Unless that is consented to, we will have to follow the ordinary rule.

Mr. Dexter: I have no objection.

Mr. Paine: I now offer in evidence the contract between the P. J. Carlin Construction Company and the Guerini Stone Company, dated December 16, 1910.

Mr. Dexter: No objection.

The contract in question was then placed in evidence and marked Exhibit 1, for the plaintiff.

[Printed herein at page 12, as part of the complaint.]

GEO. A. FOLLETT, called by plaintiff, and sworn:

Mr. Paine:

My name is Geo. A. Follett, and I am a resident of Baltimore, Md. I am general superintendent for H. P. Converse & Company of Boston, and at present I am in charge of a bridge that they are constructing over a branch of the harbor of Baltimore. I have been there about a year and a half. That bridge is of concrete and structural steel; the amount of that contract is approximately $750,000.

Mr. Paine: I shall have to use this witness later as an expert so I am qualifying him now.

Before I took charge of this work in Baltimore, I was in charge of the contract for a pier in Boston, consisting of pile work, concrete, structural steel and the head houses, and which ran into about two and a half million dollars. I had about 1100 men for about six months and a smaller number for the balance of time.

In connection with the contract, which has been offered in evidence, for work in Porto Rico, I was the local agent for the Guerini Stone Company here at San Juan, and in charge of the work as the superintendent. As local agent I was in charge of the work and was the person who issued orders and generally was in control of our part of the work.

Q. What was the first step that you took in connection with this contract?

A. Well, the first I knew about this contract, I was in
37 Boston in January and the early part of February, 1911, and Mr. Converse directed me to come down to San Juan. I left New York about the 18th of February, 1911, and came down here. There had been already sent two men, Mr. Guerini and one or two moulders for making the plaster moulds. Mr. Converse came down with me on the same boat. He is the President of the Guerini Stone Company and he is the senior partner of H. P. Converse & Company.

Q. What did you find with regard to the condition of the work on the building when you arrived in February, 1911?

A. I arrived here about the 23d having sailed from New York on the 18th, and when I got here the building site had been cleared of any buildings or trees or other objects if there were any, and Carlin & Company had a few men working digging trenches for foundation footings. I don't know whether they had placed any concrete in the foundations or not. If they had, it was a very small amount. The Carlin Company was doing the work on the foundations.

Q. At the time of your arrival was the condition of the building such that you could go ahead with any of the work on the building under your contract?

A. No, there wasn't anything we could do.

Q. During the first few months did you have any interviews with the representatives of the defendant company with regard to when you could begin your work?

A. Yes, Mr. Fred Carlin was down here at that time and Mr. Sullivan was under Fred Carlin. When I got here I expected to put in perhaps two or three weeks in putting up the machinery and getting the supplies of sand and stone and putting in the forms so that we would have a chance to go to work in about a month, and after I looked at the foundations I expected then to go to work in about a month, expecting that they would finish the foundations at one end of the building and give us a start, but that did not happen.

Q. What did you do in connection with your work on the building during the period after you arrived and before the foundations were ready to receive your work?

A. Well at once on getting here, we set up our office shed
38 and the shop and store sheds, and two or three moulders and Guerini who had come down about the same time that I did, started in making their moulds, getting ready to make the plaster mounds for the artificial stone which had to be cast separately outside of the building. They worked on these moulds fairly constantly all that spring and summer.

Q. Will you explain to the jury what those moulds were and how far they were needed for your work on the building?

A. There were certain stones; there was a certain part of the work that the government wanted cast in a mould, that is, an artificial stone cast in a mould, which was not to be cast in the building. It was to be cast separately and for that work we had to make some special moulds of plaster of Paris which had a special surface inside in order that the stone would not stick to the mould. It is a special work. The work that required these moulds was the most ornamental part; the part that had the most breaks in the surface. Such as the eagle and the small ornaments around the windows. The total yardage or cubic feet would not be a very large portion of the job. It would be very small in fact.

Q. How long was it before the building was in such condition that you were able to actualiy start your work on the building?

A. Well, we actually started work on setting granite, which they had exercised their option for us to set, about the 12th or 13th of October in 1911, but there was some little trouble the first two or three days. The first actual work upon that was about the 16th of October, 1911, at which time they had delivered enough granite for us to start. We were notified that the defendant exercised its option and called on us to set the granite about the middle of September; about a month previous to the time we started setting.

Q. Who furnished the granite?

A. As far as we were concerned, the Carlin Company was to furnish all the granite, at the building site.

During that period from February until October, the defendants dug their trenches where the foundations were to go and placed the concrete in those foundation footings.

Q. When did they begin to place the concrete in the foot-
39 ings?

A. I can't tell that. It was spread over the whole priod from February until September or October. A little had been

started soon after I got here. That continued all through the summer.

Q. When were the foundations ready to receive the granite? I don't ask the exact date, but in a general way.

A. If the granite had been here, I expect we could have started setting granite the early part of July. Enough footings would have been ready at that time so we could have started.

Q. How long were you engaged in setting the granite?

A. We set granite from the 16th of October until the 12th day of February, at which time we ceased setting granite by mutual agreement with the Carlin Company. The deliveries not coming along, we could not make any progress. When we began setting, all the necessary granite was not on the site, only very little. It came along in several different shipments at different times. The last shipment that we set arrived in San Juan about the middle of January. I think we started setting it about the day on which it was delivered at the building site, the 18th or 19th of January, 1912. We finished setting all the granite that could be set, that was ready to be set, by the following 12th of February. The granite was gotten out at quarry in the north, and cut according to plans furnished by some one else, I don't know, and was crated for shipment and was supposed to be delivered at the building site ready to be imbedded in the wall, to be set in position permanently.

Q. Were the stones cut so that each stone required a particular place in which it was to be set?

A. Yes, sir; not only a particular place, but there had to be a setting plan made on which each individual stone had a letter or number and the stones themselves were numbered correspondingly. It was like putting together a large puzzle.

Q. Did the stones arrive in consecutive order or not?

A. No, they were not delivered in consecutive order.

Q. What effect did that have on your work, if any?

A. Well, wherever there were omissions, stones above could not be set; not only that, but they did not send it in order around the walls of the building. There would be a little bit for one end of the building and some more for the other end, which kept us jumping back and forth and setting a few stones here and a few stones there just as it came.

Q. Did that have any effect on the time which you had to consume in doing your work?

A. Yes, there would be. There was one point that I never was satisfied with. It was derrick equipment. We did not have derrick equipment to carry on both ends of the work at the same time. We only had one derrick and we should have had two.

Q. Who was to provide the derrick equipment?

A. I think, according to the contract, the Carlins were to provide two derricks complete.

Q. Did they do so?

A. They did not until about the end of December, 1911.

Q. What effect did that have on the work?

A. That was in the same line. We could only work one derrick

at a time. The forms behind the granite had to be put in place, the wooden forms, and the concrete backing, as it was called, had to be poured in behind the granite. The stones had to be set in place by the derrick and also the concrete had to be swung by the same derrick and placed in the form and when we only had one derrick it made practically half speed.

Q. At the time you stopped setting granite had you set all the pieces on the ground, which could have been set at that time?

A. When we finally stopped on February 12th, yes, we had set all that could be set at that time.

Q. Was there some that remained that was not delivered?

A. Yes, sir; I don't remember how much. There was considerable.

Q. Now will you explain to the jury whether the delay caused by the manner in which the granite arrived and the derrick equipment made it more expensive for you to do the granite setting than it otherwise would have been?

A. If we had had two derricks complete, and the stone on the job, we should have set all of the granite in a very short time. We could have worked the two derricks and probably twice as many men on the concrete mixer all at the same time, and very quickly, much quicker than we were able to, we would have been able to get
41 at the interior basement partition walls, and also the Carlin Company would have been much sooner able to set their steel work on which depended the floor slabs, which we were to place. We were not to place the steel work.

Q. Now during this time until February when you stopped setting the granite, were you able to do any concrete work under your contract?

A. We placed the concrete backing to the granite and we placed some concrete on the foundations on the north wall, which were about five or six feet high, on top of which some granite came. We placed a considerable part of the interior partition walls and some of the casings of the steel columns which had been placed by that time, the 12th of February.

Q. Now did you do all the concrete work that the condition of the building allowed you to do up to that time?

A. Up to the 12th of February?

Q. Yes.

A. Yes, sir; yes, sir; every bit.

Q. Now after the time in February when you stopped setting the granite, what did you do in connection with your work on the building?

A. Well we had been carrying along our concrete work at that time. We continued on our concrete work, placing the interior basement walls and we were able very shortly after that time to start our floor slab on the first floor after some of the steel work had been placed.

Q. During the months of February and March 1912, what, if anything, if you know, took place with regard to the foundations of the building?

A. Well, along towards the end of February, cranks were noticed

along the north wall that we had built in the basement and that crack was observed for several days by the Government Superintendent of this building and it extended up through the granite arch over the window. This particular crack was in the concrete underneath the window and finally the crack was noticed in the granite above the window.

Q. What caused that crack, do you know?

A. They decided that it was because of the building settling along the rest of the wall, but not being able to settle at that particular place due to an old Spanish wall being underneath, part of the old Spanish fortifications, I understand.

42 Q. How long did you continue with your concrete work?

A. That continued satisfactorily along until the 9th of March, 1912.

Q. What happened then?

A. Well on that day I was notified by the Carlin Company that the government had informed them that work was to be stopped on this job, on this building, until some investigation had been made. Since that time we have done no work here, on the building.

Q. I show you a letter dated San Juan, March 9, 1912, addressed to the P. J. Carlin Construction Company, San Juan, Porto Rico, signed Guerini Stone Company, G. A. Follett, Agent, and ask you if you wrote that letter.

A. I did.

Mr. Paine: I offer this letter in evidence.

The Court: No objection, the letter is admitted.

The letter in question was then placed in evidence and marked Exhibit 2, for the plaintiff, and was read to the jury by counsel.

Q. Now I show you a letter dated San Juan, March 11, 1912, addressed to the Guerini Stone Company and signed by the P. J. Carlin Construction Company, and ask you if that is the reply that you received to that letter.

A. Yes, sir; that is the reply.

Mr. Paine: I offer that letter in evidence, your Honor.

The Court: No objection, it is admitted.

The letter in question was then placed in evidence and marked Exhibit 3 for the plaintiff, and was read to the jury by counsel.

Mr. Paine: I offer in evidence letter to the Guerini Stone Company, dated San Juan, March 27, 1912, signed by the P. J. Carlin Construction Company.

The Court: No objection, the letter is admitted.

The letter in question was then placed in evidence, marked Exhibit 4 for the plaintiff, and was read to the jury by counsel.

Q. Now after receipt of the reply, which I have read, to your letter asking what should be done about the men, what action did you take with regard to the men?

A. I kept the men around the job for about three or four
43 weeks, as I remember. They got pretty discontented and they didn't want to stay around although I was paying them and had to pay them, so I wrote a letter to the Carlin Company asking them if they could use our men so as to keep them here, otherwise I would ship them north on the boat leaving on the 3d of April. I didn't get any reply in time and I let the men go north on the third of April.

Q. How long did you stay in Porto Rico that spring?

A. I was here after that until about the first of July, 1912.

Q. Now during the period from March 9, 1912, until you went north in July, 1912, did you see the progress of the work on the Federal Building?

A. Yes, sir; I was here nearly every day. Work had been started in repairing the foundations. I can't tell when it started, probably about four or five weeks after the suspension, after the investigations were made.

Q. How far had that work progressed July 1st, 1912 if you can state that in a general way?

A. Well, they had a good start on it. I don't know how much they had completed. I came to Porto Rico in November of that year and saw the condition of the Federal Building then.

Q. Had the Federal Building then arrived at the condition where you would have been able to proceed with your work under your contract?

A. No, sir; up to about the middle of that month we would not have been able to have gone ahead with our work. They were still working on the repairs to the foundations.

Q. So that in November, 1912, came the time when you would have been able to continue with your work if you had continued under the contract?

A. It would have been not earlier than the middle of November; a little after that, I don't know how much.

Q. Now at the time that you sent those men north in April, from your experience and from your knowledge of conditions on the site, were you able to form an estimate as to how long it would be before you would be able to continue your work on the building?

A. I made an estimate of the time. I estimated five month-. That was the longest estimate that was made at the time. It turned out to be about seven or eight months.

44 Q. Now then, assuming that you had started in again on your work in November, 1912, at the time when the foundations became ready to receive it, about how long would it have taken you to finally complete your work under the contract?

A. Well, provided the other materials and labor were supplied as they should have been, we should have been able to complete in 200 days or less.

Mr. Paine: Now, your Honor, I would like to follow the procedure that was followed in the first trial, that is, to let Mr. Follett retire

while I put Mr. Converse on to complete the story, so to speak, and then put Mr. Follett back to prove the damages, etc.

Mr. Dexter: I have no objection to that.

Cross-examination.

By Mr. Dexter:

Q. Mr. Follett, you were familiar with the work, which the Guerini Stone Company agreed to do under the sub-contract, of course?

A. Yes, sir.

Q. Referring to section first of that sub-contract, is it not a fact that the work to be done by the sub-contractor was—I used the word first, it is not in the contract but it is my own word—first, to furnish and set in position, including the concrete backing, all the imitation of sandstone?

A. Yes, that is in the contract; yes, sir. That is one thing.

Q. Now explain to the jury just what that work involved, this imitation sandstone, and how much was to be used in this building under this contract. Was it to be put in the foundations or in the walls or where?

A. It was to be placed in the exterior walls, as an outside finish.

Q. Above and from what floor of the building, this sandstone?

A. I can't tell that. It is in the outside walls. It did not go into the foundation, nor in the granite. Practically, it was to be placed on top of the foundation and the granite. There was a small quantity under the granite on the north wall. Until the foundations were constructed and the granite laid. We could not lay any sandstone, except this portion on the north wall, which is a comparatively small portion. Another part of the sub-contract was to construct the interior concrete walls, concrete floors and concrete roof.

45 Q. And that concrete work could not be done until the foundation and the basement floor were constructed, could it?

A. Well some of that work could go ahead as soon as the steel work was up. There is a lot of the concrete slabs that rest on the steel work only. If the steel columns and girders and beams were in place we could place considerable floor slab before the exterior walls were in place even. This steel work rested on the foundation footings below the grade of our work. We could not put up any exterior concrete walls, concrete floors or concrete roof until the foundations were ready, but work could go ahead before all the granite was in place. The contract also provided for backing the granite construction. That rested upon the foundation. We could not back the granite construction until the granite had been set in place on the foundation beneath.

Q. And the same is true as to enclosing the I-beams; those I-beams could not have been laid until the foundation and basement floor had been constructed?

A. The steel work rested on separate foundations, separate from the wall foundations. They had foundations of their own. The steel columns could be placed on their own foundations, and the

girders and cross-beams, without any reference to the other foundations.

Q. There wasn't anything to interfere with you doing this concrete work, enclosing the I-beams, was there?

A. The I-beams were not in place. We could not do it until they were up in place. We are waiting for them to be put in place for a considerable time.

Q. The delay in the foundations or the defect in the foundations or the delay in the granite had nothing to do with the contract for enclosing the I-beams; that is a separate matter altogether, isn't it?

A. The steel has to be placed before we can put that concrete in.

Q. I don't find in your complaint that you make any claim against the Carlin Construction Company for failure to put up these steel beams; am I correct?

A. I don't know about the complaint.

Mr. Paine: The complaint does set forth the delays. I have served notice on Mr. Dexter to allow me to amend my complaint to
46 conform with the proof. But we are, of course, claiming damages for all the delays on the part of the defendant to provide labor and materials, and, if Mr. Dexter insists, I make the motion now.

Mr. Dexter: I insist that the evidence is not material under the allegations of the complaint as it stands.

Mr. Paine: Then at this time, your Honor, under notice which was served on May 11th and in pursuance to a portion of the opinion of the Appellate Court, I now move to amend paragraph five of the complaint so that the same shall read as follows: "That thereafter, and until the 16th day of October, 1911, this plaintiff was not permitted by this defendant to proceed with the work provided for by this contract, owing to defendant's failure to provide the granite blocks necessary therefor, and also owing to defendant's failure to properly construct and to complete the foundations of said building, and to supply work, labor and materials not included in the contract between these parties and which defendant was obligated to supply. That on or about said date, this plaintiff did proceed with its work with all possible diligence and performed all the work on its part."

The only change which that makes in the complaint, your Honor, is to add the following: "and also owing to defendant's failure to properly construct and to complete the foundations of said building, and to supply work, labor and materials not included in the contract between these parties and which defendant was obligated to supply." And I now move to amend my complaint to conform to the proof.

The Court: Is there any objection to that?

Mr. Dexter: There certainly is. This amendment is not so innocent as appears or as Brother Paine would have your Honor believe. It is a very decided enlargement of the issues of the case by the allegation of new and distinct matter upon which to base the al-
47 leged breach of the contract by the defendant, and so much is that true, if your Honor please, that a reference to the decision of the Supreme Court discloses immediately the great im-

portance of the amendment. In other words, as paragraph five stands today and as it is in the complaint and was before the Supreme Court of the United States, the recovery is held by the Supreme Court of the United States to be limited for the period in question to the alleged delay in the matter of the foundations. Now then your Honor will see that in paragraph five as we have faced it up to the present time, it is stated: "That thereafter, until the 16th day of October, 1911, this plaintiff was not permitted by this defendant to proceed with the work provided for by this contract owing to defendant's failure to provide the granite blocks necessary therefor." There you have the alleged breach of the contract, the alleged cause of action on the part of the plaintiff. Now then what do they attempt to add by this amendment? They propose to add to and include in the complaint *to* the words which I have read to your Honor, the additional matters as follows: "and also owing to defendant's failure to properly construct and to complete the foundations of said building, and to supply work, labor and materials not included in the contract between these parties and which defendant was obligated to supply." Now then we have come here prepared to try this case the second time upon the issues as we found them in the pleadings and that for the period covered in paragraph five until the 16th day of October, 1911, the only ground or alleged breach of the contract by the defendant consists in the alleged failure to provide granite blocks. Now we have prepared our case, the President and the witnesses for the defendant company are on the sea today and will be here in a few hours, and they have left New York with the expectation of trying this case upon the allegations of paragraph five as it exists in the
48 original complaint, and I submit to your Honor that to permit plaintiff now to open up this matter at this late day after the case has been called for trial, would be, if your Honor will pardon me, in my humble judgment, an abuse of discretion. If this matter had been submitted to your Honor any time before the departure of the defendant and the defendant's witnesses from New York, there might have been some foundation for urging the amendment, but nothing of that kind has been done, and I submit to your Honor that it would be altogether unfair and unjust to permit such an enlargement of the issues at this time and at this point in the trial.

The Court: The previous trial and the pleadings at present are based on the alleged default of the defendant to supply granite blocks, and that is all?

Mr. Dexter: Up to the 16th of October, 1911.

The Court: And it is now sought to amend the complaint by alleging an additional default on the part of the defendant in that it did not furnish proper foundation on which the plaintiff could build, is that the point?

Mr. Paine: Yes, your Honor, I will make that claim. That would be very material in connection with the computation of three hundred days and that is why it is of such vital importance to us. All this matter went into the evidence at the former trial. The Supreme Court, in examining the pleadings in the case, said in passing that it would seem that up to the 16th of October the pleader had not

alleged any other cause of delay *then* the failure to furnish the granite, although after that period these other causes of delay, particularly the failure to furnish foundations, were alleged. So the Supreme Court said: "The pleader would seem to have limited the complaint respecting delay prior to October 16, 1911, to such as was due to defendant's failure to provide granite blocks, but the evidence was not thus limited." So that, instead of this being an application before your Honor at this moment to put in a new
49 element at this trial, it is simply putting in an element which was in the former trial. And I called Mr. Dexter's attention to this on May 11th. The proper way to raise that, I understand, is by a motion at the trial to be allowed to amend the complaint to conform to the proof. There is no possible claim of surprise here, and in order to cut out any possibility of claim of surprise, I was careful to serve notice on Mr. Dexter, so that Mr. Dexter must be prepared to meet these issues because he met them before, at least he put in his evidence to meet them before, and, if he ever will be prepared to meet those issues, he is as well prepared now as he can ever be. So I ask in *the* pursuance of justice that the pleadings be amended to conform to the proof, there being no surprise or disadvantage taken of the defendant.

The Court: Such amendments are necessarily discretionary with the Court and its seems to me that the proper course to be taken in this case is as follows. This evidence was admitted at the previous trial. It was in point of fact known to the defendant. Notice was served that application would be made to amend, and this notice seems to have been May 11th. This I believe is the 31st. No motion was made other than what is now made today. I think it is right that the amendment should be allowed, but I think that in order to avoid any inconvenience, any harm, to the defendant, unless the time is waived, I will allow the amendment and adjourn the further hearing until tomorrow at half-past nine. In the meantime the defendant will be here. I think he is entitled to be consulted upon what is before the Court. It is a proper amendment, so that, unless the time is waived by defendant's counsel, I will allow the amendment but will adjourn the further hearing until tomorrow morning if counsel for the defendant so wishes, or rather, I will make that order without consulting him if he does not waive the time. It is a difficulty that comes up in trying cases here. It comes up very often. There are witnesses who are at a distance and they cannot be consulted by counsel

50 Mr. Paine: I think that is a very fair ruling and there will be no objection to adjourning the trial until tomorrow morning.

The Court: The amendment is allowed and the further hearing of the case will be set over until tomorrow morning at 9:30.

June 1, 1916.

Mr. Dexter: I take pleasure in presenting to the Court for the purpose of admission in connection with the case now on trial, Mr.

John C. Wait, a member of the bar of the state of New York also a member of the District Court of the United States of New York, and I ask that he be enrolled as an attorney of this Court for the purpose indicated.

The Court: The Court takes pleasure in recognizing him as associated with this case and the clerk will enter his name.

Mr. Dexter: I also state that as a result of the conference had since the arrival of the president of the defendant company and Mr. Wait, we have determined that Mr. Wait, with my consent and desire, shall conduct the examination of witnesses and be in charge of the trial of the case with my help and assistance. Therefore I will ask your Honor to recognize him as leading counsel. That has been made necessary from the fact that Mr. Carlin and such witnesses as we have, arrived only recently and they are much more familiar with the facts of the case than I am.

The Court: I suppose there is no objection to that. I wish only one counsel in charge of the actual handling of the case, one on each side.

Mr. Dexter: For the purpose of starting in on the proceedings today by way of finishing up what was left undisposed of yesterday, I understand that your Honor has admitted the amendment
51 prayed for by the plaintiff to paragraph five of the complaint.

The Court: Yes, sir.

Mr. Dexter: Under these circumstances, defendant asks leave to amend its answer in paragraph fourteen as follows: paragraph fourteen now reads: "Defendant further answering the said complaint says that the subcontract as aforesaid between plaintiff and defendant was and is subject to all the terms and conditions of an original and principal contract executed between defendant and the Government of the United States of America, by its duly constituted authorities on the — day of December, 1910, providing for the construction in the City of San Juan of a so-called Federal Building."

Now the defendant asks that it be permitted to add to that allegation the following: "which said original contract was by the agreement and understanding of the parties to the sub-contract adopted as, and made a part of the latter, subsequent to the execution of said sub-contract and for and upon mutual considerations accruing to the said parties."

The Court: Any objection to that amendment?

Mr. Paine: I plead surprise. Of course at the first trial of this case there was no suggestion of anything of that sort. The position was taken that the mere fact that the general contractor had a contract with the Government of the United States, of itself and of necessity, read that contract into ours. That was one of the points that was taken up on appeal to the Supreme Court of the United States and the case was there argued and decided on that theory alone. Up to this time I have not been advised that there was any claim in the case that there was any understanding or that there was any claim in the case that there was any absolute agreement embodying the original contract into our contract, and, if I correctly apprehend the amend-

ment, that is the effect of it, and therefore I will plead surprise to that amendment.

52 The Court: What action do you wish to take?

Mr. Paine: I will object to the allowance of the amendment by your Honor.

Mr. Dexter: The charge of surprise hardly lies from the fact that the allegations of our original answer must necessarily have called to the attention and notice of the plaintiff the fact and the issue which the defendant sought to assert, that it was relying upon the provisions of the original contract in connection with the controversy with the sub-contractor. Now the only difference is that, instead of alleging it as we have done in general terms practically as the conclusion of the pleader, we have alleged that the sub-contract was adopted subject to the terms and conditions of the original contract. Now we go further than that and say that it was adopted not by act of law but by agreement of the parties, so that the issues which the plaintiff is called upon here to meet today are in no sense changed. We are relying today as we relied before upon the former trial, upon the fact that the original contract must be taken as a part of the sub-contract. Before we asserted that as a proposition of law. Now we are asserting it as a proposition of fact.

Mr. Paine: Before your Honor rules I would like to call your Honor's attention to one other consideration that just occurred to me. Your Honor will remember that the original contract was made between one Guerini and the defendant company and was later assigned to us. Owing to the fact that we had no notice that this point of a modification of our contract would be raised, we have not considered it necessary to have Mr. Guerini here as a witness. Now it might conceivably be that defendant would set up the claim that Mr. Guerini, after making this contract, had entered into some oral alteration. Now is not the time to go into whether that would be proper or not, but if it were made we would be helpless. Mr. Guerini

53 is not here. There is no allegation in paragraph fourteen that there was any agreement entered into between the parties incorporating the original contract into our contract.

(The jury is excused from the court room during the further discussion of the proposed amendment.)

The Court: This is a suit brought by the plaintiff upon the breach of a certain contract between the Guerini Company and the Carlin Company. The agreement is made a part of the complaint. The original answer in paragraph fourteen claims that the sub-contract—this was a sub-contract—was and is subject to all the terms and conditions of the original principal contract between the defendant and the Government of the United States, providing for the construction in the City of San Juan of the so-called Federal Building. The construction of that paragraph fourteen evidently is that the sub-contract by law made the original contract a part of the sub-contract. The fact that *their* is an amendment now asked, shows that the original paragraph fourteen was drawn

on that theory. The Supreme Court passed upon that theory, deciding that it was incorrect. The Supreme Court discusses it at some length and decides that the original contract was not in any way made a part of the sub-contract. That being so, on the trial of the case, after the jury is impanelled and one or more witnesses examined, evidence introduced at all events, the defendant asks leave to amend paragraph fourteen by making it read so that there could be shown the specific incorporation of the original contract in the sub-contract. The plaintiff objects on the ground of surprise. The general rule is that where a party or his counsel is taken by surprise by a point or circumstance which could not have been anticipated, and where an injustice has been done, a new trial should be granted. Well, of course, it is not necessary to go the length of allowing the amendment and then granting a new trial. That is a waste of time, a waste of effort every way, a waste of justice. It looks to me as if this constitutes a surprise. It
54 may be a perfectly good defense. I am not passing on that, but asking it in the course of the trial does amount to surprise. I am inclined to think that if it is a good defense it should in some way be got at, but certainly not to the extent of making the other side go to trial when he has been surprised. I would be willing to allow the amendment if in some way we could manage to have a retrial, a trial later. I am not quite certain about the practice of how to get at that, the case having been entered on. Can you gentlemen throw some light on that practice?

Mr. Paine: I can only say this; if there is any substance to that defense it seems almost obvious that there would have been something said about it at the first trial. Whether as a matter of law the original contract was incorporated in the sub-contract was one of the points fought out at the first trial and if the defendant had had substantial evidence to back up that claim, it is inconceivable to me why it was not brought up then. Now four years later we have brought our witnesses from New York and such an amendment is asked that I might not proceed with the case in view of the fact that Mr. Guerini is not here and I would be helpless as to any testimony in regard to him. Counsel has had plenty of time to notify me, and, if he had done what I did with my amendment, served notice on me several weeks before of this point, we would have come here prepared to try it. It seems to me it is clearly one of the cases where the discretion of the Court should not be exercised. It is entirely a matter of discretion, and, as a matter of abstract justice and common fairness, it is all on one side it seems to me.

The Court: That is not the point on which I asked light. Suppose I should exercise my discretion the other way, in what manner could we dispose of the jury without there being error? In other words, suppose I conclude that I should allow the amendment, I do not think I would be willing to do it and force you
55 to continue the trial, but that being so, as a matter of practice, how can we get rid of the fact that there is a jury here?

How can we take it from the jury? Of course by consent that could be managed but I am not talking of consent.

Mr. Paine: I confess that I don't see how to get at it.

Mr. Dexter: I would like to say in reply to what Mr. Paine has said, your Honor will recall that not to exceed a month ago the defendant made an application for a continuance of this case and we presented an affidavit in which it appeared that we were making diligent effort to secure the attendance of Mr. Guerini and other witnesses, particularly Mr. Guerini, as being the other party to the sub-contract, and we learned that he was in Mexico and we were unable to produce him here as a witness or to obtain his deposition. That was why I was unable to offer this amendment before, but since Mr. Carlin, the president of the company, has arrived I have been able to learn that there are facts and there exists evidence to justify the amendment which we asked. So that the matter must be determined in the light of the particular circumstances surrounding this particular case. We have been laboring, as your Honor knows, with one difficulty. The other side has its difficulty in coming here, but the only purpose and object of the Court is to see that justice shall be done to both sides. That each side shall have a fair and impartial opportunity to present its case. The fact that Mr. Guerini has not been obtainable, his presence or deposition, by either party, notwithstanding that both parties have attempted to do so, ought not to deprive the defendant of the right to avail itself of this amendment.

The Court: Was this complaint under oath?

Mr. Paine: Yes, sir.

Mr. Neagle: Mr. Dexter's statement as to what happened on the motion for an adjournment, in regard to Guerini, does not
56 bear out in any way the application now made for an amendment because the application for a continuance simply stated that they wanted to use Mr. Guerini as a witness. The application did not state what he was to testify in any respect as regards the oral amendment of this sub-contract between Guerini and the Carlin Construction Company. Your Honor will remember that on the authority which I cited to you, it was stated that they must show what he would testify to and that they must also show that they could get Guerini here at the next trial. Nothing was shown as to what he would testify to or that they could get him here at the next trial. The question of the amendment comes up now for the first time, and, as I understand it, no written amendment is offered. As one of the attorneys of record and the attorney of record in this case for the last four years, no notice of this amendment was served on me and no indication that there would be such an amendment, and in view of the fact that this case has been decided by the Supreme Court for four months and in view of the fact that I notified Mr. Dexter in the early part of March that we desired a trial and nothing was said until Mr. Carlin and his counsel from New York arrived here after the trial has been started, while the plaintiff has brought its witnesses here at great expense, it seems to me that the application is exceedingly illtimed and particularly

for the reason that there is no showing made now that they can ever get this man Guerini, and your Honor's discretion practically rests upon the fact alone and nothing else. In view of the circumstances, in view of the efforts that we have made to get the case to trial, in view of the effort that I made to have Mr. Dexter's application for an adjournment heard on three hours' notice, and this application, if there was any merit in it, could have been made then it seems to me that the motion should be denied. It seems offhand to one who has been here since March trying to get
57 the case on, that it is something that is thought of at the last moment, something that Mr. Dexter never thought of, and I think that your Honor's discretion should be exercised only one way, because if the application had been made, if it had been a timely application, I should not have gone to the trouble that I did in trying to get the case tried and have Mr. Paine and Mr. Converse and Mr. Follett come here. Every attempt possible has been made to put the case over and they have all failed. Your Honor has, in the exercise of the discretion allowed you, ruled that they should go to trial and this application seems to me of less merit than any application that has been made heretofore.

Mr. Dexter: Suppose, your Honor, that it developed in the course of this trial, by the admitted statement of the plaintiff itself, that there was an agreement such as we have alleged in our amendment, would we not have a right to conform our pleadings to the proof, exercising the same right that the plaintiff availed itself of yesterday?

Mr. Neagle: But that amendment was noticed several weeks ago and there was plenty of time to communicate with the defendant in New York so that he could get ready. Everything that we have done has been done with plenty of notice. We are ready to try now. They say we cannot go to trial because of this thing which we never heard of before and which Mr. Dexter never heard of before.

Mr. Paine: If there is any acknowledgment which can be in any way construed into a modification of the contract to that extent, let them produce it now to substantiate their motion to amend.

The Court: Is there anything further to be said, gentlemen? If not, it occurs to me that the proper solution would be this. An amendment is asked. The allowance which is asked is important. It does change the evidence to be offered in the case. The suit is upon a written contract. The amendment sets up that that
58 contract was modified by oral agreement, necessarily between the parties, either the principals or the agents, whoever they were, the parties controlling the contract. Now that is an important point. It does, however, effect a surprise on the plaintiff. It is true it has been some four months since the decision of the Supreme Court. It was decided February 21, 1916. It is also true, however, that parties on both sides, plaintiff and defendant were not in San Juan and have not been. It seems to me the amendment should be allowed because the point could be proved one way or the other if it exists, but I am not willing to do that in such a way that

would work hardship on the other side, that is, work irreparable hardship at all events. I will allow the amendment but I will entertain a motion on the part of the plaintiff, following the procedure here, for a postponement of the trial in order that the plaintiff may prepare himself to meet that particular issue.

Mr. Paine: Note my exception please.

Will your Honor allow me ten minutes to discuss the matter with my clients?

The Court: We will take a recess of ten minutes.

Mr. Paine: After consultation with my clients, we have decided not to apply for an adjournment because that would necessitate our returning to the States and coming down again for another trial, so your Honor will of course allow me to preserve my rights and note my exception and we will go ahead.

Mr. Dexter: I don't know whether the record shows an exception to the amendment allowed yesterday. If it does not, I should like to have it appear.

The Court: Both amendments are allowed.

Your amendment should be under oath.

Mr. Dexter: Yes, I will have it put under oath.

(The jury is brought back to the court room and the trial of the case is resumed.)

59 Cross-examination of Mr. FOLLETT.

Continued by Mr. Wait:

Mr. Wait: If the Court please, and the gentlemen of the jury I will continue the cross-examination of Mr. Follett.

The Court: Yes, sir.

Q. Mr. Follett, are you a graduate engineer or architect?

A. No, sir.

Q. What has been your training in school or college for engineering or architecture?

A. I put in about two years in a civil engineering course in the State University of Ohio and I put in about three years at Cornell in what they call the Arts Course, which has optional courses. I had a great deal of mathematics and physics and chemistry and different branches that the engineers have, although I did not specialize in that. I have no degree from Cornell in Arts. I attended two years at the University of Ohio where I took an engineering course, and then I was three years in Cornell taking an engineering and scientific course.

Q. What experience had you had in engineering or architectural work when you came on this work, of this building?

A. I had been connected with H. P. Converse & Company of Boston for about seven or eight years, as I remember it, previous to that time. I went out on the jobs; I worked as an iron worker; I worked around the jobs about three years or four years of that time. That means that I was actually a house smith or iron worker

on structural steel. In that same time I handled some work involving brick work and some other lines that came in with it. We set up some large kilns in New Britain, Connecticut.

Q. Not what we did; what did you do personally?

A. On that particular job I laid out the lines for the kilns and hired my mason foreman, obtained the brick work and steel work and saw that the whole thing went together according to the plans. That lasted about three or four months. I don't remember the value of that work.

I was at another job at a little town called Esopus on the Hudson River, at which place we had a steel contract for the
60 College of the Redemptorist Fathers. I went down on that job as the only representative of our company. On this work, I picked out and told the men where each piece of steel was to go as it was set. On another job I was timekeeper.

Q. How large was that job?

A. I don't remember the amount of our contract or how many tons of steel there were. The structure was a college building for the Redemptorist Fathers, which was probably three or four hundred feet long and contained a library and large dining room and a chapel, and was about three or four stories high. It was all under one roof. We had the steel work only.

I have served as timekeeper on one or two jobs. One job I remember was down in Pennsylvania near Allentown, cement works. That was steel work. I don't recall any other jobs. I was taken into the office shortly after that. I was bookkeeper for about two years and kept all the accounts of the firm. H. P. Converse & Company started as steel contractors and worked into the general contracting, including the brick and concrete work that generally went with the steel.

Q. Up to the time of this job their work had been almost entirely steel work, up to January, 1911?

A. No, sir; I would not call it that. We built two or three buildings for the Barry Wool Combing Company of Barry, Mass., the entire contract, including water mains and all the work on the buildings. Those were of reinforced concrete. We built a reservoir of reinforced concrete for holding water. We sublet very little of our work, and not the reinforced concrete.

Q. Now do you know of anything else that you have had to do with any work that you were experienced in, that you can tell us of what you did?

A. I worked as an estimator for checking the quantities of jobs that we were estimating to bid in our office for a year or two. That was immediately after I was bookkeeper.

Q. Now how many years have you given altogether of your experience after enumerating these years after you came from Cornell?

A. I think I have accounted for about six or seven. I think it was about seven years before I came here. I was not an officer
61 of the Guerini Stone Company when I came down here. I was their legal agent here. I understand that Mr. Guerini himself was an officer of the Company.

He was its Vice-President and Mr. H. P. Converse was President. Mr. Guerini was personally here upon the work and came down the week previous to the boat that I came on.

Q. And throughout the period of time that you were here, he was here with the exception of one or two visits to the States of one or two weeks each?

A. Approximately; there was one time when I asked that he be recalled to the States and he was. That was along about the end of 1911 or the early part of 1912; I don't remember the date. He came back shortly after on his own account, he was not sent back. He came without our knowledge. I don't know whether or not he resigned as an officer of the Guerini Stone Company.

Q. Now you mentioned some harbor work or a bridge over a harbor branch at Baltimore, is that a steel structure?

A. That has steel reinforcement. There is no steel in sight on the finished bridge. That is a cantilever steel frame which is buried in concrete. It is not for the City of Baltimore, that is for the State Roads Commission of Maryland. The chief Engineer of the State Roads Commission was in charge of that work. Under him there was a resident engineer in charge of the district that our contract was in, and then they maintained a force of eight or ten inspectors on the work. We have civil engineers working for us all the time. I had two or three on that job. I am actually in charge of that work. I was at the beginning and am now. I went on that work in September 1914. It is not completed. I left there just previous to coming here about two weeks ago.

This improvement in Boston to which I testified was known as the commonwealth pier, No. 5 in South Boston and is built by the City board in charge of the harbor work in Boston. We had the general contract, and I don't remember anything that we did not have. We did the pile work and didn't sublet it. We did sublet a great deal of it. We did not sublet a part of the Baltimore work. We did not sublet the most of the Boston work. We sublet some of the
62 structural steel. The sprinkler system which is a patent system, was put in by the people who control that. The elevator work we sublet. The furnishing of the steel frame, some 10,000 tons, was taken by a steel mill. They wanted to take the erection and the riveting and we allowed them to do it. That was the structural steel. We did the concrete, and it was reinforced. We set some granite stones. We built railroad track, ballasted and laid the rails and put in the ties. We built retaining walls for the track beds. We put in several miles of water mains. By we, I mean H. P. Converse & Company.

Q. What did you do?

A. I was in charge of that work as General Superintendent throughout the entire job. I always have engineers with me, the government also employed inspectors, and they had a surveying crew there to lay out the lines. I employed 1,100 men on that work myself.

Q. Now then when you first came down on this work, you came down here because Mr. Guerini didn't understand English very well

and to take charge of the business negotiations and correspondence, did you not?

A. I came down here in charge of the job.

Q. Now do you say you came down here in charge of the work when Guerini obtained this work and he was the Vice-President and he was the master hand?

A. That is just the point. He was not the master hand. He knew how to do one thing; he was a specialist in one line only.

Q. Did you know that the defendant never knew you on this job until November, 1911, when Mr. Converse wrote us a letter that you were to represent him down here?

A. No, sir; I never knew that.

Q. Didn't all the negotiations and correspondence take place between the defendant and Mr. Guerini for the construction of this work up to November 22, 1911?

A. I don't think so.

Q. Will you show us a letter, except one on October 25, 1911, that you ever wrote and signed yourself or per yourself during the administration of this work?

A. I don't recall any right off the bat, quick, up to that time.

Q. Isn't it a fact that Mr. Guerini signed the correspond-
63 ence and that you were down here because of your knowledge of English, and did he not sign every letter up to October 25, 1911

A. Why, I don't think so; no, sir. He undoubtedly wrote some letters and signed them. I wrote some for him. He was the Vice-President of the Company, I had no title except as Superintendent.

Q. Up to November 22d when you were designated by Mr. Converse to the defendant as the man to communicate with hereafter?

A. I don't know about that letter you speak of. I was here under the same circumstances all that time. Mr. Converse recognized me as in charge of the job. On February 18th, 1911 I left New York.

Q. When you got here what did you do the first thing?

A. When I came down here I expected to begin work immediately.

Q. I didn't ask you what you expected.

Mr. Wait: I move that that be stricken out.

Q. What did you do?

A. As far as this job was concerned, we started to put up our office. I bought lumber; I paid the payrolls; I contracted that a shed should be built for an office and a shed for our store room. We had to store certain articles. I employed every one on this job.

Q. Did you select the men to set the granite down here, or did Mr. Guerini?

A. I selected some and Mr. Guerini selected some of them. Mr. Guerini selected all the masons and all the men that worked on the artificial stone. He did not select the carpenters, I did; well I did not no, not all of them. Some of them were sent here from Boston and were selected by Mr. Converse. I had fourteen men here from the States. I think there were more than two carpenters.

Q. As far as the correspondence and your letters and communica-

tions with the defendant, did you send more than two carpenters down here from the States and designate them as carpenters?

A. I couldn't testify to that.

Q. A good deal of this correspondence was conducted by Mr. Converse from Boston, was it not?

A. He had a great deal of correspondence from his office; yes, sir.

Q. Now while you were here in October, November and
64 December you were married, were you not?

A. Yes, sir. That was the 26th of December. Prior to my marriage I was here at San Juan all except ten days as I remember it, when I had a trip to the central part of the Island along in October, 1911. I can't remember the date. It was along about that time of the year. I was married in San Juan. That was the 26th of December, 1911. My Intended was here prior to that time, for a month or more. I do not recall that I was absent from the job quite a little while she was here. I don't remember a very sharp letter from the defendant about my absences particularly. I got a lot of sharp letters from John J. Carlin. I don't remember that letter.

Q. But you remember being away from the job, don't you?

A. I remember this trip up in the hills, along in the fall of 1911; I don't remember the date.

Q. If you were here on pay day that was all that was required of you along about that time, wasn't it, to pay the men? You handled the money?

A. I handled the money.

Q. And if you were here to pay the men off that was all that was required of you?

A. No, I handled the correspondence and received the mail and opened and answered it.

Q. And while your intended was down here you felt that that was all that was required, didn't you?

A. No, sir.

Q. Isn't it a fact that you were sometimes away from this work five to seven days repeatedly during October, November and December, 1911?

A. No, sir.

Q. And did not come to the job at all?

A. No, sir; that is not a fact.

Q. Did you know, Mr. Follett, when you first came down here what the plans for this work were?

A. I had not seen the plans before I left Boston, we received our plans about the 24th of March, as I remember it, after I had been here about a month.

Q. When you came down here you didn't expect to start setting any stone without any plans did you?

A. The granite, I did not understand that we would set that at all until along in September. We were notified then. We didn't ex-
pect to do any of our work on this building until we had
65 plans to work from, we couldn't do the work without plans; of course not. I do not know when our people, the Guerini Stone Company, got the plans.

Q. Do you know that we had a receipt from the Guerini Stone Company for the United States Government working plans on December 29, 1910?

A. Those were the general plans.

Q. You didn't bring them with you when you came down here, did you?

A. I don't recall; I think perhaps Mr. Guerini brought them down before I got here. I don't remember that the plans were here when you got here, I remember having the plans here but I don't remember the date when I first saw them. We got the detail plans in March, showing three-fourths scale drawings and full scale drawings, about the 20th or 24th of March.

Q. Did you ever see this drawing (handing a blue print drawing to the witness), referring to the top one, the first one?

A. Yes, sir; I have seen that. That is one of the three-fourths inch scale drawings which we received about the 20th or 24th of March.

Q. Now are you very sure of that?

A. To the best of my recollection; yes, sir.

Q. Did you write and prepare most of the correspondence for Mr. Guerini, that went from San Juan to New York and Boston?

A. Most of it, yes, I think I did.

Q. Well, do you remember that Mr. Guerini made some drawings showing how this artificial stone for that building would be joined in blocks?

A. No, sir; he made some drawings or models showing the jointing from one day's work to the next of the concrete that was to be poured in forms in the building, not the joints in the artificial stone.

Q. Did he not as early as January 20th or 16th, 1911, prepare and send to New York plans one, two and three, showing the setting plans of the concrete block stones?

A. I can't testify to that. That was before my acquaintance with the job; before I came down here I don't know that Mr. Guerini was down here a month or two before I came. He came on the steamer before I did. I came on the 18th of February from New
66 York. He may have made other trips before that. I knew very little about this job before February 18th, 1911. I was not here and I didn't work on it in Boston I knew very little about it before I came. I left New York on February 18th, 1911 Mr. Converse came on the same boat. I had not discussed this work that was to be done down here, with Mr. Guerini before I came down. I didn't know that when Mr. Guerini took this work, that he supposed that this building, the outer walls of it, were to be cast in block stones and set up like cut granite. I didn't know what his impression was. I can't testify to that. I don't recall ever discussing with him that plan after I got here and that he believed that that was the programme of the Government. I came down expecting to build molds and forms, for a certain part of the work. That was for the decorative part, the caps of the columns and where there was molded and carved work. After putting up sheds and getting ready, we proceeded to make our molds for the artificial stone.

Q. When you *make* these molds and forms do you recall that you were stopped making them because the jointing had not been determined yet by the Government?

A. No, sir; you have the wrong impression. That particular artificial stone di dnot concern the jointing question.

Q. There were not any molds or models needed nor plaster of paris molds for the work that backed up the granite and the basement work, was there?

A. No, sir. Mr. Guerini was a modeler in clay, and he came down here to mold these pretty decorations on the front. He molded the eagle in clay and he molded some of the decorative parts in front also, I think he did a little more than he was required to do. More than the Government required. He went ahead and made some models which were not necessary. It was when I came down. I don't think he had done any work before I came down here.

Q. I show you a letter dated February 14, 1911, from the Guerini Stone Company, Boston, to the defendant, and ask you if you recall that letter.

A. No, sir; I don't know anything about that. That was before my advent.

67 Mr. Wait: I understand the rule is to mark it for identification.

The Court: Yes.

The letter in question was then marked: I for the defendant for identification.

Mr. Wait: Do I understand that the letter can be read now or later?

The Court: No, sir; not until it is offered.

Q. Do you recall, Mr. Follett, that up to October 12th or 13th that you had no stone setters down here at all but that you were employing native labor to set your stone?

A. We didn't set any stone before that time.

Q. Well do you remember that you had no stone setters down here?

A. The men we had here, set the granite subsequently.

Q. But at that time did you have anyone here that you called a stone setter or that you knew to be a stone mason for setting stone?

A. Yes, sir; these men were Italians that we brought down here. They were skilled in all kinds of stone work, the setting of natural stone and the setting of artificial stone, and the setting of artificial stone is no different from the setting of natural stone.

Q. Do you know if the men that Mr. Guerini had down here ever set a stone before?

A. I never saw them set a stone before. It is a conclusion except from the fact that Mr. Guerini said that they had done that work for him perviously.

Q. When was the contract made to take over the setting of the granite, which was optional in the sub-contract?

A. It was agreed to be done when the contract was signed. It was an option in the contract. The option was exercised about the middle of September, 1911, when I first heard about it. At that time the sub-structure or foundations was ready in part to receive the granite setting. We set some granite about the 12th or 13th of October, 1911. That granite had to be changed. I don't remember that Mr. Guerini set it too low from an eighth of an inch up to an inch too low, but we stopped because there was some question as to the length of the granite course as compared with
68 the concrete underneath. I think that it had to be taken out because it was an eighth of an inch too low at one end.

Q. But you remember that the granite was set too low?

A. There was one place where that occurred. I had not remembered it until you reminded me.

Q. Is that what you referred to as being set about October 13th?

A. There was stone work that had to be changed the next few days. We actually set stones that were left in place, on the 16th of October, 1911, and I call that the date of the starting of the stone setting. At that time I was here and Mr. Guerini was here.

Q. You saw and knew the exact condition of the foundations at that time?

A. Well, I saw what I could see by going over the job. At the time that I began to set granite I observed the condition that could be observed by the eyes, of the work that was here. Mr. Guerini and I were both here and saw that condition when you took up the granite setting.

Q. And at that time there was a considerable quantity of granite here, was there not?

A. There was very little granite here at the start.

Q. I don't care anything about the start. On October 16, 1911, there were two cargoes of granite in this harbor, were there not?

A. I don't know. The bills of lading show that. I remember February 12, 1912.

Q. You say at that time we ceased setting granite by mutual agreement with the Carlin Company, were you present when that agreement was made?

A. No, sir.

Q. Then how could you testify to it?

A. I had information from the man who was present.

Q. Then it was hearsay, wasn't it?

A. Yes, sir.

Q. Now at this time, on February 12, 1912, you say the deliveries were not coming along; we could not make any progress. What deliveries did you refer to?

A. I meant the deliveries of the cut granite which we were setting.

Q. Now tell me how much cut granite there was not delivered on February 12, 1912, if you know.

A. I can't testify definitely to those facts.

Q. How many pieces of granite came to this job to complete it after February 12, 1912?

A. I can't tell.

69 Q. When you began setting how much granite was on the site? You say: Very little. How many cargoes of granite were here October 16, 1911, when you began setting?

A. I don't know.

Q. Then why did you say very little?

A. There was very little stone delivered at the building site. It is not cargoes in the harbor. It is delivered at the building site.

Q. How much stone, if you know anything about it, had been delivered here on October 16, 1911?

A. I can't testify to that.

Q. When did you say the last shipment of granite came here?

A. I never knew when the last shipment came. I think that was after I left the job.

Q. Were you on this work during the setting of the granite from day to day?

A. During those two days; yes, sir. October 16, 1911, to February 12, 1912.

Q. Do you remember Mr. Guerini's lifting up a large block of granite and swinging it around and the lewis breaking and its dropping?

A. I remember an incident like that.

Q. And it went down on some granite that had already been set and smashed several pieces, did it not?

A. No, sir; it broke a spall off one piece, not several pieces. I saw the broken stone; yes, sir. I didn't see it fall.

Q. Did you know that Mr. Guerini had put the lewis in and that it was the fourth time that he put the lewis in the lewis hole and that it fell after that?

A. No, sir; I don't know; I was not there at the time.

Q. Don't you know that that smashed three stones which had to be recut on this site or brought from Providence?

A. No, sir; I don't know that.

Q. Now when you came down here upon this work some questions arose about the derricks, didn't there?

A. Yes, sir.

Q. Do you remember that the Carlins, the defendants, had two stiff legged derricks here?

A. If they did have they were never set up.

Q. Just answer the question will you?

A. I can't tell. I never saw a stiff legged derrick here. I got here, February 23rd, I think.

70 Q. And did you never see a stiff legged derrick on this job?

A. Not erected, no sir.

Q. I didn't ask you that.

A. There may have been some lumber around on the ground; I don't know whether it was a guy derrick or a stiff derrick.

Q. Will you explain to the jury the difference between a guy derrick and a stiff legged derrick?

A. A stiff legged derrick is made with a mast and two ells which run out from the foot of the mast at right angles and these two

ells have posts from the end of them up to the top of the mast and it is all held together. The stiff legs are generally also guyed. There is a guy running from the top of the mast back to the ground. The idea is to make a clear space for three-fourths of a circle in front with nothing to interfere with the swinging of the boom, which often happens with a guy derrick. The guy derrick consists of a mast which has some kind of guys running from the mast head out to the sides, sometimes three guys and sometimes five or six, and the boom swings in under the guys, the result being that very often you can't raise the boom very high and swing it at the same time. The guy interferes with the swinging of the boom. The rigging of the boom and the boom fall are practically the same. The engine part and the motive power are the same. The guy derrick can swing the full circle. No derricks were erected when I came down here. I do not recall any conversation between Mr. Guerini and Mr. Carlin and Mr. Oaksmith, representatives of the defendant, about the boom derricks that we required. I do not recall that when Mr. Guerini came down and the questions of derricks came up, that he insisted on having a guy derrick. I think we insisted that we should have two engines, one on each derrick. That was one of the things which we insisted on and which there was some difference about between us and the general contractors.

Q. And it ultimately resulted in your getting an electric hoist for one of the derricks, didn't it? Mr. Guerini got an electric hoist?

A. We got an electric hoist but I was trying to recall whether it was used on that derrick.

Q. Don't you remember that it was used on the derrick
71 first and afterwards on the hoist for the materials?

A. I remember that it was used on the concrete hoist, but I don't remember about that derrick.

Q. Do you remember that soon after you started to use this electric hoist, it burned out?

A. I don't remember that.

Q. Didn't know that it was burned out and you had to get new windings for it?

A. No, sir; I don't remember.

Q. Where were you then?

A. I was here it is so long ago that I don't remember. I don't remember that Guerini's motor burned out, I do remember that Guerini or I complained that we couldn't use the one engine on both derricks.

Q. Now in your testimony you say that you had to set the stones, meaning the granite, and back the granite up with cement work and that you had only one derrick and therefore you could work only at half speed; you meant that you wanted two derricks, one to set the granite and one to pour the concrete?

A. That would have been better. That was the intention at the time. That was my idea, that it should have been furnished.

Q. If the one derrick had to set the stone and convey the concrete for the backing, it was pretty busy, wasn't it?

A. Yes, sir; it would be busy in any case.

Q. And it utilized the derricks pretty fully and completely setting stone and backing up the granite.
A. It used one derrick; it didn't use two.
Q. Then one engine was enough, wasn't it?
A. No, that is just the trouble, sir.
Q. If you could use only one derrick at a time and you had one engine, that one engine would operate that one derrick all right, wouldn't it?
A. Yes, sir.
Q. And that did it, did it not?
A. Yes, sir. I do not remember that when you came to erect the guy derricks you had difficulty in getting steel and wire rope with which to erect them.
Q. Where were you at that time?
A. I was here.
Q. Why was any complaint made about the derricks?
A. Because it was part of the contract.

Mr. Wait: I move that that be struck out.

72 Q. The general contractor agrees to furnish two derricks complete and one engine and the sub-contractor to pay for the cost of operating the same when used by him; that is all there is said here about derricks, isn't it?
A. That is enough; yes, sir, and that is all.
Q. This doesn't say that he shall erect them, does it?
A. To furnish two derricks complete.
Q. I ask you again. This contract does not say that the general contractor will erect the derricks, does it?
A. I think it does; yes, sir.
Q. Will you show me the words in this contract, referring right there or any other place in the contract, where it says that the general contractor will erect the derricks or either of them.
A. The general contractor agrees to furnish two derricks complete.
Q. Is that all?
A. That is enough.
Q. And that is what I base my conclusion on that the general contractor was to erect the derricks.
A. Just those words?
Q. That is what I thought. Now this contract says two derricks complete and one engine. You insisted that the general contractor should furnish two engines, did you not?
A. I don't care whether he furnished one engine or forty engines. They were to be complete and they are not complete until the engine is furnished.
Q. And if you went down to the market on South Street in New York and said: I want a derrick complete, do you pretend to tell this jury that you would get a hoisting engine and boiler with that?
A. It would be useless until I did.
Q. That is not a question. Do you mean to tell me that if you purchase a derrick complete, that you would get an engine and boiler with it?

A. That would depend on what you intended.

Q. Now if you had used a stiff legged derrick, you would not have required any guys, would you, such as you did require for the guy derrick?

A. I don't think I am competent to say as to that. I was not to furnish the derricks.

Q. Is there anything in this contract which says what kind
73 of derricks we would furnish you, stiff legged or guys?

A. No, sir.

Q. But you did insist on guy derricks, didn't you?

A. I don't know about that. You said Mr. Guerini talked about that.

Q. Do you remember Mr. Guerini sending to Boston or New York for one or two granite setters?

A. Yes, sir. I do not remember when they arrived on the job.

Q. Do you know that they did not arrive until November 22d?

A. Very likely that was the time; I don't remember.

Q. Did you know that Mr. Guerini and Mr. Converse made a proposal and asked to be permitted to do the structural steel erection here, the setting of the granite and the laying of the brick, and that they gave us a lump sump proposal for that?

A. I didn't know that they requested such a thing; no, sir.

Q. Well did you know that in August and September negotiations were going on between the plaintiff and the defendant to do all of the work down here except the trim and the doors and the windows?

The Court: Was that before or after the contract was signed?

Mr. Wait: After the contract, in August or September, 1911.

A. I knew that there were negotiations; yes, sir. I had not talked with Mr. Converse about them. We had one or two letters back and forth.

Q. Did you make an estimate of the cost of that work down here?

A. I had something to do with that. I have forgotten the details that I went into on that. I remember that there were some brick to be made in a moulding machine, that was one question.

Q. Did you and Mr. Guerini down here prepare a bid for that work?

A. I think we did. I don't recall the figures. I take your word for the figures of $35,761. I should think that is about the price?

Q. Do you remember and were you on the job when the piers along in this building on that side, the easterly side, and on the
74 northerly row were put up and were you on the job?

A. I was here; yes, sir. I think that was along in November, of 1911. At that time I had had experience enough in concrete work to know how to read a plan, I think we had all our plans for the work here, I remember that we built certain of those piers without having any iron reinforcement in them and I remember that the Government required them to be taken down and that they were taken down and rebuilt with steel reinforcement in them, I was here when that was done and remember it. The plans showed that steel reinforcement was to go in those piers, and I remember

that when we built them, or Mr. Guerini built them, we didn't put any steel reinforcement in them.

Q. You did not put the steel reinforcement in those piers, did you?

A. In those piers; no sir.

Q. And that took considerable time to tear those piers down and rebuild them, didn't it?

A. I don't remember; I gave the bill for the time to the Carlin Company. I don't remember how long it took. I do not remember that took some weeks.

Q. You don't? That is a matter of record. Do you remember when you were doing this work of Mr. John J. Carlin, the superintendent for the defendant, asking you after you had got your concrete in to go inside and lay the basement floors?

A. I think he did; yes, sir.

Q. Do you remember that Mr. Guerini did not and would not do it?

A. Yes, sir; we would not do it.

Q. That is enough. Do you recall also when Mr. Guerini started to set granite, that Mr. John J. Carlin asked him specifically to start on the southwest corner?

A. That is over here (indicating)?

Q. No, it is over here, southwest.

A. I don't remember that.

Q. You don't remember that Mr. Guerini did not start on the southwest corner?

A. We worked on both corners those first two or three days.

Q. Yes, you set one piece of granite on one side and then quit work there and went over to the other side.

75 A. We were stopped. That was two or three days previous to October 16th. I don't remember that Mr. Carlin asked Mr. Guerini to start on that corner, I don't recall any altercation, any unhappy things about it.

Q. Now we come down to March 8th or 9th, 1912, according to your testimony, and you say you were notified by the Carlin Company that the Government had informed them that the work was to be stopped on this job until some investigation had been made. Who of the Carlin Company notified you of that?

A. Is that my letter that I wrote?

Q. This is your testimony that I am reading.

A. Mr. Oaksmith, who was in charge of the work here, told me. He had a conversation with me and told me that as early as March 8th or 9th, you will find a letter from me to that effect.

Q. Mr. Follett, isn't it a fact that you or Mr. Guerini went up to Mr. Berryman's office, who was the Government Inspector, and demanded to see his correspondence and papers with Washington as public documents and that you had a right to see them before March 9, 1912?

A. I don't recall that; no, sir.

Q. You don't recall going to Mr. Berryman and demanding these papers as public documents?

A. After that time?

Q. Before March 9th.

A. I don't recall that; no, sir.

Q. And you don't recall that you had knowledge about the stopping of this work, through Mr. Berryman, before the Carlins knew anything about it?

A. No, I don't remember that.

Q. You do remember going to Mr. Berryman's office for information, don't you?

A. I was in Mr. Berryman's office quite often.

Q. But you don't recall this?

A. I don't recall this matter; no, sir.

Q. Was Mr. Converse here at this time March 9?

A. I don't remember; I don't think he was.

Q. Had Mr. Lootz come down here at that time?

A. He had come and gone; yes, sir.

Q. How long did he stay?

A. I think he was here just from the arrival of one boat
76 until the same boat sailed north. He was a civil engineer for Mr. Converse's office. Mr. Converse sent him down here, I think to take charge of the work. I never gathered that very straight.

Q. Well it shows that Mr. Lootz came here on December 18th and that we received a letter on December 19th that Mr. Lootz will take charge. Did you ever get a copy of that communication or letter to us?

A. I didn't know about that until Mr. Lootz got here and told me about it. I don't recall that he brought a letter appointing him in charge of the work. I would not question his word anyhow.

Q. Well do you remember that in February and up to the 17th, that Mr. Guerini went to New York?

A. He was in New York about that time. I can't recall the dates. I don't recall that prior to his going to the States, that he had some differences with the Inspector on this job. I remember that indirectly he had given me considerable trouble so that I complained about him to Mr. Converse; and it was claimed that he had become somewhat obstreperous.

Q. And he had some difference with the Government Inspector?

A. I don't remember about the Government Inspector but I remember about some other persons.

Q. Was Mr. Striele the Government Inspector?

A. He was at the first part of the work. I have forgotten when he was relieved, somewhere towards the end of 1911, I believe.

Q. You remember pretty clearly, don't you, Mr. Follett, that Mr. Stierle was accused of being dishonest, by Mr. Guerini, and that Mr. Guerini threatened to take it to Washington?

Mr. Paine: Objected to as not proper cross-examination.

The Court: The objection is sustained.

Mr. Wait: Grant me an exception, Judge.

Q. Well do you remember also about these piers where you had nitted the reinforcement rods, that we wrote you a letter and that ou didn't like the letter?

A. Very likely, sir.

Q. And do you remember coming back at the Carlins and insisting that the letters be withdrawn and that a new letter be written?

A. Yes, sir; I wanted an order to do the work.

Q. And do you remember writing the letter yourself and asking Mr. Oaksmith to sign it?

A. No, sir; I don't remember; perhaps that occurred.

Q. When you came down here February 17th or 23rd, 1911, was ere anything whatever to prevent you from building your sheds nd installing your machinery and getting ready to build forms and olds?

A. There was nothing to prevent our buildings sheds and starting ork on our molds, but there was something to prevent our setting p our machinery. The foundations had to be put in, so that we ould put our runways and machinery on top without interfering ith the building of the foundations later. I mean by that our achinery for making and placing our concrete; the concrete mixer nd whatever was necessary, the runways and some sheds, etc. The unways were practically nothing but horses and planks, for wheelarrows. All the machinery that I spoke of was concrete mixers nd horses and planks for the wheelbarrows to run on. That is subantially correct. We operated our concrete mixer when we first ame down here, by electric motor. I don't recall when we got that ectric motor. We had the mixer before December 12th, I don't reall any concrete we made by hand. I do not remember when we ot the motor that ran our concrete mixer. We installed the woodorking tools and buzz saws for making the molds. There was nothng to prevent our installing that; there was no need of it. We put p our wood-working machinery so that we could saw, edge, plane, atch and mold wood, along towards the end of September, 1911, should judge.

Q. And you took from February when you arrived until September o put up your temporary plant to make molds and forms did you?

A. Working on it all that time, and we didn't get it installed from anuary or February until September. This artificial stone of hich this building is made was a stone of which Mr. Guerini was upposed to be an adept in the manufacture. I understood he had anufactured artificial stone and had a reputation for that kind of work, I didn't know it personally. I do not know that the Government required samples to be submitted of the stone and the concrete and the sand and stone and cement which we ere to put in this building.

Q. Didn't you, being down here on this job, did you ever send ny samples to Washington for the approval of the Supervising rchitect of the materials you were going to use here?

A. It is true that I sent samples, but I don't think they were required. Don't know that the con-ract and the specifications required hat.

Q. Do you think that the Government and the Supervising Architect would let you come down here and put up a building that was to cost half a million dollars, without knowing what you were going to put into it?

A. I don't recall anything in our contract that requires that.

Q. Now didn't you know that in these specifications you were required to submit samples of your materials and the artificial stone to the Supervising Architect?

A. I don't know, that we were required but I remember that we did so.

Q. When did you send to the Supervising Architect any samples of artificial stone?

A. I don't think we sent any samples of artificial stone. We sent samples showing the jointing from one day's work to the next. There is bound to be a construction joint.

Q. Were those samples showing the jointing made of artificial stone such as the face of the building?

A. Substantially so; yes, sir.

Q. When did you submit or send those samples?

A. It was along about June or July of 1911. We sent a box of samples to the Carlin Company at their office in New York, the first time. We also sent samples after that to Washington direct, by request of the Carlin Company. I don't recall the date, I do not know what happened to the first samples that we sent the Carlin Company. They were little cubes of artificial stone about five or six inches on a side and they were to show different surfaces and jointing of the same, contained in the artificial stone process.

Q. Now will you say that there were several samples shipped in June or only one?

A. There was one box that had about four samples, as I remember sent in June, 1911. That is my recollection and it is very clear.

79 Q. Do you remember afterwards being told that by reason of insecure packing these samples had been broken, cracked and chipped so that they could not be used to send to the Government?

A. Yes, sir; we were told that several months later. There was a considerable period there. Then I made up the second box of samples. I don't remember the date.

Q. You couldn't cast any stone whatever for that building until your samples were approved by the Government, could you?

A. Not of that kind of stone. There was another class of stone that we could.

Q. What class of stone was it that you submitted samples of?

A. That was the artificial stone to be moulded in the shop, as I remember. That was the only stone that was to be moulded, in figures and forms and shapes.

Q. Then it comes to what I asked you first. You couldn't mold or cast any artificial stone until your samples had been approved at Washington by the Supervising Architect, could you?

A. That is correct, and that brings it down to about October or November, 1911, before we could begin any casting of stone.

Q. Now do you remember when you did get your samples approved?

A. No, sir; I can't tell you. I don't know whether it was November or December or January, I can't tell you that date at all.

Q. Don't you remember that the first samples that you sent up there in June were samples of artificial granite which we were seeking to have the Government accept instead of the natural granite?

A. I don't recall that; no, sir.

Q. Well you remember, don't you, that the Government had an alternative in our specifications to use artificial granite instead of natural granite?

A. I don't know that.

Q. Don't you know that Mr. Guerini wrote us and tried to have the Carlins adopt or have adopted artificial granite instead of natural granite, because it would save time?

A. That must have been before my connection with the contract. I don't remember the making and sending of these samples of artificial granite.

Q. Now if you didn't get your artificial stone accepted, or
80 didn't submit samples until October or November for submission to the Government at Washington, what molds did you make in plaster when you first came down here in February, 1911?

A. We made the molds for the stone, the artificial stone that was to be cast in the shop and set in the building as separate stone.

Q. Can you describe any of the pieces so we can go out and look at them and identify them, for which you made molds?

A. I recall that eagle on the other side; that was always in the way. That mold was in the shop. That was cast, in plaster of paris. We had all the molds for the stone up to the cornice line up to that summer or fall, about September up to about the day we began setting granite.

Q. Did you attend any conversations or did you know that Mr. Guerini asked special permission to set the granite so as to keep his men busy and himself down here?

A. No, sir; I don't know about that. I was not present at such a conversation.

Q. The giving to you of the granite setting filled in very happily and gave you something to do whereas otherwise you would not have had so much to do, didn't it?

A. I don't think it had much to do with that. As soon as the granite setting started, the backing would also start, so that our work would start in any case.

Q. You had a number of men down here and you wanted to keep them busy, didn't you?

A. We had a few men, I don't remember just how many.

Q. But you had the setting of the granite and that gave you considerable more work than you would have had if you had not had the granite to set, didn't it?

A. That is true; yes, sir.

An adjournment of Court was taken at this time until 2 p. m., the same day.

81 2 p. m., June 1, 1916.

Cross-examination of Mr. FOLLETT continued.

By Mr. Wait:

Q. I think, Mr. Follett, we were down to about March 9th or 8th. How long did you stay after March 8th or 9th at the work here in San Juan?

A. I was here until about the first of July of the same year.

Q. Do you recall a communication on May 22d practically terminating the contract?

A. I saw that afterwards; yes, sir. I didn't see it at that time. We didn't do any work after the 9th of March, I am sure I don't recall whether Mr. Guerini was here after March 9th or not, I can't remember. I don't recall that Mr. Guerini was at work here on March 14th, he possibly was.

Q. Your records show that he worked up to March 16th; now do you know? Were you here?

A. What was he working on?

Q. Setting granite, etc.

A. Not for me.

Q. It is your distinct recollection that no work here was done after March 9th?

A. That is my recollection.

Q. And from March 9th to May 22d you kept employees here and continued to pay them wages, did you?

A. Most of the men left here about the 3d of April. I kept a few after that. Up to April 3rd I kept them here and paid them. I sent them away on April 3rd, 1912.

Q. Then apparently, so far as you were concerned, you determined to do no more work after April 3rd, didn't you?

A. The men were here and being paid.

Q. Can't you answer the question?

A. They were not doing any work on this building.

Q. You didn't send them to New York and Boston expecting to do any more work did you?

A. Yes, when the delay ceased.

Q. Then when you sent your men home to Boston and New York, you sent them there in order to mitigate any damages that you might suffer, is that the idea?

A. No, not damages; it was to keep down the expenses.

82 Q. Those losses and expenses you charged Carlin with, you expected to be reimbursed for, didn't you?

A. Yes, sir.

Q. Then it was — mitigate the damages that you sent them away, wasn't it?

A. I am not a lawyer.

Q. Well, to keep down the expenses?

A. To keep down the expenses; yes, sir.

Q. Now on March 8th what had you to do under your contract here?

A. We had to finish the first floor concrete between the beams which had been started; partially, and to carry up the exterior walls and the concrete floors above the concrete that was in the roof, and there were one or two sections of partition wall in the basement that were not completed at that time.

Q. And you also had to complete the setting of the granite, didn't you?

A. We ceased setting granite on January 12, 1912.

Q. As far as the Carlin Construction Company was concerned, there was nothing immediately for them to do about March 9th, 1912?

A. They had a great deal of steel work to be placed.

Q. But the steel work was all placed on the first floor and you were concreting between it, were you not?

A. No, it was not all placed. We were concreting over a portion of the floor.

Q. Don't you remember distinctly that on March 8th all of the structural steel on the first floor, such as the beams and columns were in place so that you could concrete between them?

A. No, sir.

Q. What was omitted?

A. The steel work around the derricks, immediately around the derricks, was omitted so that the derricks could be operated.

Q. Of course, that was for your accommodation, wasn't it?

A. Oh, no.

Q. How could you operate the derricks if the steel columns wouldn't permit the boom to swing?

A. We had finished the granite setting some time before that and were not using the derricks at that time. We didn't use the derricks to put the concrete in we had a concrete elevator to get our
83 concrete up on the second floor at that time; before March 9th; we had been using it for some time. I remember that distinctly.

Q. So far as any places that you wanted to concrete, there was nothing to prevent so far as any steel not being placed, was there? There was plenty of work for you to concrete.

A. At that particular time, we had been given several days of a good chance to put in concrete; yes, sir. At that particular time we were getting along pretty well.

Q. And there was plenty of steel set for you to put the floor in?

A. Yes, there would have been for a few days more anyhow.

Q. Now at that time on March 8th the only thing that you knew about this, was that the Government had ordered an investigation; isn't that right?

A. You are referring to my talk with Mr. Oaksmith?

Q. I am referring to March 8th; nothing had been done by the Government except to order an investigation, had there?

A. I understood from Mr. Oaksmith that that was the fact and that we were to stop the work on the building.

Q. Nobody knew how long that investigation would go on, how long it would continue, so far as you were concerned.

A. No, that would be a matter of estimate.

Q. And that investigation did occupy the time up to April 3rd, didn't it, and beyond it?

A. There was some work started on the repairs of the foundations a little before that to my recollection.

Q. Are you sure of that?

A. But there were distinct investigations after that stoppage.

Q. Those were investigations in order that the Supervising Architect should determine what to do, weren't they?

A. I presume so; yes, sir.

Q. Now do you recall after March 8th that Mr. Oaksmith asked you for a statement of what men you had here and what you were paying them and what your expenses were from day to day?

A. I received a letter from him to that effect, or from the Carlin Company, asking me to give them a daily item of the expense we were being put to on account of that delay.

84 Q. And on March 26th you refused to give him the names, the prices and the class or the wages of your men, didn't you?

A. I don't recall that.

Q. You recall that you did not give it to him, don't you?

A. He called for an item of expense.

Q. And you refused to give it to him.

A. I refused to give him that expense item because I didn't have the items to make it out.

Q. Didn't you tell him that you thought it was a piece of impudence on his part to ask for it?

A. No, sir.

Q. Do you recall receiving on April 3d a letter from the Carlin Construction Company, asking for the same information?

A. April 3d, that is the date the men left. I recall receiving a letter that day. I don't remember what it was.

Q. I show you a letter which was put in evidence at the other trial, dated April 3rd, and ask you if you remember receiving that letter?

A. Yes, sir; I received that here.

Mr. Wait: I ask that it be marked for identification.

The letter in question was then marked No. 2 for the defendant for identification.

Q. Now did you furnish to the defendant any information as to what you were paying your men and what your losses and expenses were from day to day?

A. No, sir.

Q. Do you recall during the progress of this work while you were setting granite that a water main burst and flooded the works?

A. I don't recall that.

Q. You were here every day?

A. Yes, sir; I was here. I don't recall that a water main burst here on this site and flooded all the grounds underneath here. I do not recall their removing a lot of granite, over a water main, so as to get to it and repair it. I do not recall that Mr. Guerini or myself were held up for crushed stone and couldn't get it sometimes for considerable periods. I do not remember when the bridge broke down on the electric railway here and I didn't get any stone for nineteen days.

Q. Were you away that whole nineteen days?

A. I don't know that that happened. I don't recall it; no, sir.

85 Q. Do you remember and recall that sometimes the street railway or tramway did not deliver stone to you for three and four days at a time and that you did not have stone for your work?

A. No, I don't recall that. I don't remember our making complaints that the railroad company delivered stone to the Carlins and didn't deliver it to us.

Q. You never made any such complaint?

A. I may have done so; I don't recall it.

Q. Do you remember December 12th receiving a letter with respect to the amount of granite that had been set and the amount of granite that there was here at the building?

A. From the Carlin Company? I remember seeing such a letter. I don't remember whether I received it here or a copy.

Q. Do you remember that there were 5,000 cubic feet here on the job and that you had set only 199 cubic feet?

A. I remember that that was said.

Q. It was true, wasn't it?

A. No, sir.

Q. What was there about it that was not true?

A. The amount set.

Q. Did you claim that you had set more than 199 square feet?

A. Cubic feet was what they said.

Q. Did you claim that you had set more than 199 square feet?

A. Yes, sir.

Q. How much had you set?

A. That would have to be an estimate because our estimate of the granite set was made up about the 30th of that month, at which time it was around 2500 square feet. I don't remember that our first estimates were in cubic feet and not in square feet.

Q. Granite estimated by square feet is the square feet that show, isn't it?

A. That was the way we were to be paid by the contract.

Q. As I go along past this building and note the windows, the stones under each window are all the same size, aren't they, as far as span is concerned?

A. Apparently so.

Q. And the stone in between the windows are broken up and cut in practically the same manner, aren't they?

A. Yes, practically so.

Q. And the arch stones are interchangeable, are they not?

—. No.

86 Q. You know that a stone which was marked for the front could be used in between these windows.

A. I think we did that once or twice.

Q. If the stone came so that you could not keep the continuity, you could interchange other stones for it and did it, didn't you?

A. Up to a certain point, yes.

Q. Do you remember putting up the elevator hoist for your concrete in the northeast elevator shaft?

A. We put up our mixer so that it would discharge about that place. We didn't put up an elevator there. We didn't put up a mason's elevator, in the elevator shaft.

Q. How did you hoist your materials up from the basement where the mixer was?

A. When our mixer was in the basement we were dumping into a bucket which the derrick took and placed in position for backing the granite.

Q. I mean afterwards when you came to do your floor work, how did you get the concrete up stairs?

A. Our mixer was moved out onto the street so that it was outside of the building and the elevator was outside of the building. We didn't put a hoist in the northeast elevator shaft. I don't recall any such thing.

Q. Do you remember when your first application for any money was to these defendants?

A. No, I can't testify to that.

Q. Do you know that it was at the end of the year 1911, on December 30th?

A. I know that I made up an estimate and sent it into our office about that time.

Q. That was the first estimate you had ever made and the first request for money, wasn't it?

A. I don't know about the money. My estimate was for the quantities.

Q. Do you know whether that was an estimate for all the work you had done from February 23rd up to that time?

A. That came to about that 2,500 square feet of granite, that I mentioned, and 340 or 350 cubic yards of concrete. 2500 feet of granite at forty cents a square foot, would be a thousand dollars. I couldn't tell that, the other would be about $3,000.

Q. Do you remember what you estimated your cubic yards

87 of concrete at? What price?

A. Well, I have seen the estimate since; I didn't know at that time.

Q. The fact of it is that you had no unit price. Your contract price was a lump sum, wasn't it?

A. Yes, in the contract.

Q. You mentioned as one matter of complaint in your testimony the jumping back and forth in setting granite. Your derrick was

set so that you could jump back and forth with it in setting granite, wasn't it?

A. You mean by changing from one derrick to the other?

Q. No, on one whole half of the building you could set granite with one derrick, if it was there, couldn't you?

A. We could reach half of the building with one derrick.

Q. And the other derrick reached the other half?

A. Yes.

Q. And when you say that you were jumping back and forth, there was nothing to prevent you from setting from one window to another window one, two, three, four or five and then going to another window jamb and setting three or four.

A. That is what we had to do.

Q. How did that in any way harm or delay you?

A. It delayed us by making the work go slow.

Q. How? Your derrick reached from one of those places to the other?

A. The men had to walk around from place to place and the mortar boards have to be shifted from place to place.

Q. All the additional expense due to that jumping around was to move your mortar tubs from one place to another, and your men, wasn't it?

A. And also to shift the derrick.

Q. That was when you went from one half of the building to another half of the building, was it?

A. Yes, sir.

Q. That was a small matter, wasn't it, that jumping around?

A. They were small matters but they accumulated.

Q. I think you said in your direct-examination you were never satisfied with the derricks; is that right?

A. We were never satisfied with them until they got that second engine which was about towards the end of December, 1911.

Q. When who got the second engine?

88 A. I think it was the Carlin Company. You asked me about that this morning, about that electric engine.

Q. According to your contract you were to have only one engine, weren't you?. That is right, one engine.

A. That had nothing to do about the derricks.

Q. I don't ask you for an explanaton. The Carlins, according to the contract, were to furnish only one engine.

A. That is a part of what they were to furnish.

Q. In your direct testimony you said that you kept the men around the job for about three or four weeks after March 9th. Why did you keep the men around the job three or four weeks?

A. I wanted to find out if possible about how long that delay would be and if it was a matter of a month or six weeks we would keep them here in order to have them here to go ahead with the work.

Q. You made that the subject of a letter to the Carlins and they answered it, didn't they?

A. Is that the letter of April 3rd?

Q. No, the letter that your counsel offered.

A. Yes, I wrote them about the subject. I have forgotten the date.

Q. The dates were March 9th, Exhibit 2; March 11th, Exhibit 3; and March 27th, 1912, Exhibit 4, and when you say that you asked them about it, you asked them by letters, didn't you?

A. Yes, sir.

Q. Well you stayed in Porto Rico from the 3rd of April, when you sent your men home to New York, up to the first of July; and did you continue to draw your salary and your pay.

A. Up to the 1st of July; yes, sir.

Redirect examination.

By Mr. Paine:

Q. What part of the work did the samples which you mentioned in your examination with reference to the jointing between one day's work and another on the so-called imitation sandstone; what part of the work did these samples apply to?

A. They were to apply to the exterior walls, the outside walls of the building above the granite work, from the first floor up.

Q. Could those outside walls of the building be constructed
89 before the foundations were put in place and the granite setting completed?

A. No, sir.

Q. Who furnished the steel under the contract?

A. As far as we know, it was the Carlin Company. We had nothing to do with it.

Q. Who furnished the plans, the detail plans?

A. They were furnished to us by the Carlin Company.

Q. Was there any time when you were unable to get deliveries of crushed stone when the crushed stone was needed to continue your work?

A. I don't recall any such times, no.

Q. Did you give orders to Mr. Guerini during the time he was here?

A. Yes, sir.

Q. Did he comply with those instructions?

A. Generally; yes, sir.

Q. Did the granite setters which you had on the site prior to November 22d set all the pieces of granite that were on the site for setting?

A. The men we had, set stone as far as they could go between each shipment. When each shipment arrived, the previous shipment had been pretty well cleaned up.

Q. Did you receive your instructions to start the granite setting, in writing or orally?

A. I have a letter, I think, from Mr. Converse on that subject. When we came to set our concrete we used our concrete mixer all the time we were setting concrete. That was installed from the time we began our concrete setting. The mixer was set up ready to begin

work and the first concrete work we did was the backing of the granite.

Q. On March 9th at the time the work was stopped, was Mr. Guerini employed by your company?

A. I was not paying him any money at that time and I understand that he was supposed not to be employed by me any more after he had gone north that winter. He came back without my knowledge and I was not paying him any money here as wages.

Q. What date were the foundations up to the basement floor completed?

A. I can't give you a date on that. Approximately, the foundations were ready for the granite work when the granite arrived. That was about the first part of October. But there were certain walls inside which required foundations, which I don't believe were
90 in place when we left the job on the 9th of March. The exterior foundation walls were not entirely in place before the granite began to arrive. The most of it was ready. There was some little work to be done.

Mr. Paine: Your Honor will remember that at the time I stopped examining Mr. Follett I requested that I might be allowed to recall him after examining Mr. Converse, so I will conclude now.

Mr. Wait:

Q. Mr. Follett, you don't mean to lead the jury to believe that there was any work on these foundations when you stopped work March 8th, 1912 that prevented you from setting granite or going ahead with your work, except possibly some right square under the derrick?

A. The interior walls.

Q. Right under the derrick, that could not be fixed until the derrick was taken down?

A. If you include the braces of the derrick; yes, sir.

Q. Oh, yes, and possibly right under your concrete mixer where you could not use it?

A. No, sir; those were not.

Q. Then you don't mean to tell this jury that this defendant had delayed this work and had not done what it should do and could do up to March 9th when as a matter of fact everything was done that could be possibly done as long as the derrick stood there; isn't that right?

A. Yes, sir; but they took a very long time to do it.

Mr. Wait: Now I move that that be stricken out.

The Court: No, sir; it will stay in as he said it.

Mr. Wait: Note an exception.

Q. Now I think it is quite true that you had a concrete mixer that was there and that was set up, but do you tell me that from the first time you used that concrete mixer there was a motor attached and that it was in operation?

A. That is my recollection. There might have been a steam engine there at first, which was replaced by an electric motor, but my recollection is that it was an electric motor. It is my recollection that there was a motor hitched to it all the time. I think the motor was rented from the Porto Rico Power & Light Company. I don't know when it was the records will show. I think we have records that will show. I can't state from my knowledge and in-
91 formation the date of the first shipment of granite that came here, was October 1st.

Q. But you did in answer to your counsel. The foundations were completed when the first granite arrived on October 1st?

A. About the first of October.

Q. Have you anything to fix that? Will you tell this jury that that was the date when the first shipment arrived or are you merely guessing at it?

A. There were two things to fix the starting of the granite setting; one was the arrival of the granite and the other was the preparing of the derricks for us to set the granite. Now perhaps the derricks were ready after the first shipment came. The granite might have gotten here a few days before.

Q. Did you know that the Wilhelmina came in on August 16th with 134 pieces of granite, with 100 tons?

A. I don't recall that; no, sir. If it is so I must be greatly mistaken when I say that the first shipment was October 1st.

Mr. Wait: That is all.

Mr. Paine:

Q. Do you know how many pieces of granite were required for the total job?

A. I can't tell you.

Q. Can you give us an approximate estimate on that?

Mr. Wait: I submit that that is not any evidence at all. We have the plans which show the exact amount.

Mr. Paine: The guess is worth the value that the jury may give to it.

The Court: Answer the question.

A. I can tell you better in cubic feet.

Q. I would rather have the number of pieces to compare with 150 pieces.

A. It is purely guess work; I couldn't tell.

Mr. Paine: All right, I will withdraw that question. That is all.

(Witness withdraws.)

HOWARD P. CONVERSE, being called as a witness in behalf of the plaintiff, was duly sworn and testified as follows:

Direct examination.

By Mr. Paine:

My name is Howard P. Converse; profession, a contracting
92 engineer. I have been engaged in that profession, since 1902. The name of my firm is H. P. Converse & Company. I am located at Boston, Mass. In the Guerini Stone Company, the plaintiff in this case. I was President and Treasurer. I was President and Treasurer in February, 1911. Mr. Guerini was made Vice-President at the time the company was organized, with purely nominal duties, nothing whatever to do with the company. In Porto Rico his position was moulder and artist. He was a moulder for all this artificial work. He moulded in clay and was used to casting. Mr. Follett's position in Porto Rico was agent for the Guerini Stone Company and in direct charge of all of the work.

Q. Now how did this contract between the Guerini Stone Company and the Carlin Company first come to your attention?

A. Mr. Guerini came into our office in Boston and said that he had this contract for the Federal Building in San Juan and wanted to know whether he would go in with him and do the job. I said that I would look it over and he was to come back in a few days and I would let him know. He left the plans with us and I looked them over and when he came in we decided that we would go into it.

Q. Now I show you a letter dated February 13, 1911, to the P. J. Carlin Construction Company, signed H. P. Converse & Co., and ask you if you sent that letter.

A. I wrote that letter.

Mr. Paine: I offer this in evidence, your Honor.

The Court: No objection, it is admitted.

The letter in question was then placed in evidence, marked Exhibit 5 for the plaintiff, and read to the jury by counsel.

Q. Now I show you a letter dated February 20, 1911, signed by the P. J. Carlin Construction Company and addressed to the Guerini Stone Company, and ask you if you received that letter in reply to the letter just introduced.

A. I received that letter.

Mr. Paine: I offer that letter in evidence.

The Court: No objection, the letter is admitted.

93 The letter in question was then placed in evidence, marked Exhibit 6 for the plaintiff, and read to the jury by counsel.

Q. Now I show you a telegram addressed to the Guerini Stone Company, dated January 10, 1911, signed P. J. Carlin Construction Company, and ask you if you received that telegram.

A. I received that telegram.

Mr. Paine: I offer that telegram in evidence.
The Court: No objection, it is admitted.

The telegram in question was then placed in evidence, marked Exhibit 7 for the plaintiff, and read to the jury by counsel.

Q. Now after receiving that telegram did you go to New York?
A. I first got the bond out; yes, I went to New York, and while there I interviewed representatives of the P. J. Carlin Construction Company. I saw Mr. Joe Carlin, the gentleman who is here now. I had a conversation with him about the work in Porto Rico. In response to that telegram, we discussed the situation, we having produced our bond, to get his directions in the matter as to what we were to do, when we were to begin, and we were told to go to Porto Rico and begin our work. And we returned to Boston and started our preparations for going to Porto Rico, and in the early part of February Mr. Guerini with a man or two was sent down and then on the 18th of February I followed with Mr. Follett, arriving here on the 23rd of February, in response to the request that had been made.
Q. Did Mr. J. P. Carlin in your interview tell you who was in charge of the work of the company in Porto Rico?
A. He did. One of the Mr. Carlins; I have forgotten his name; Mr. Fred Carlin. He was here when I got to Porto Rico.
Q. Did you have any conversation as to who would be in charge of your work in Porto Rico?
A. I did. I told him Mr. Follett would be in charge. I told Mr. Fred Carlin, and I think there was a Mr. Sullivan here a tthe time and I told them both and they understood it.
The condition of the work on the Federal Building was that certain trenches had been dug, the foundations had been
94 started but had not been completed. I was in Porto Rico about five weeks.
Q. Did you see the work from day to day while you were here?
A. I saw the work from day to day and I saw the work almost every day and I saw the progress that was being made.
Q. On your return to New York did you see Mr. J. P. Carlin.
A. I did, I went to the office for the express purpose of expressing my anxiety over the work, the way it was progressing in Porto Rico, and suggesting that the organization should be improved in some way so that the work could be hurried along.
Q. Could you do any work on your contract until the foundations had been completed?
A. We could not. The foundations were not completed when I left Porto Rico.
Q. Now I show you a letter dated San Juan, Porto Rico, September 27, 1911, to the Guerini Stone Company, San Juan, signed D. P. Oaksmith, Superintendent, and ask you if you received that letter.
A. This letter was forwarded to me at Boston and I received it.

Mr. Paine: I now offer the letter in evidence.
The Court: Any objection? If not, it is admitted.

The letter in question was then placed in evidence, marked Exhibit 8 for the plaintiff, and read to the jury by counsel.

Q. Now I show you a letter dated October 21, 1911, to the P. J. Carlin Construction Company and signed Guerini Stone Company, and ask you if you sent that letter.
A. I dictated and sent that letter to the Carlin Company in New York City.

Mr. Paine: I now offer that letter in evidence.
The Court: No objection, the paper is admitted.

The letter in question was then placed in evidence, marked Exhibit 9 for the plaintiff, and read to the jury by counsel.

Mr. Wait: I object, if the Court please, and move that that be stricken out as a self-serving declaration, the statement that it was not ready for us, and ask that the jury disregard it.
95 The Court: No, sir; the letter will have to be admitted as it stands.
Mr. Wait: Note an exception.

Q. Now, Mr. Converse, I show you a letter dated December 19, 1911, to the P. J. Carlin Construction Company, New York, from the Guerini Stone Company, and ask you if you sent that letter.
A. I wrote that letter and sent it to the Carlin Construction Company of New York.

Mr. Paine: I offer that letter in evidence.
The Court: No objection, it is admitted.

The letter in question was then placed in evidence, marked Exhibit 10, for plaintiff, and read to the jury by counsel.

Q. I now show you a letter dated New York, December 20, 1911, to the Guerini Stone Company and ask you if you received that letter in reply to the letter just introduced.
A. I received that letter from the Carlin Company.

Mr. Paine: I offer that letter in evidence.
The Court: No objection, the letter is admitted.

The letter in question was then placed in evidence, marked Exhibit 11 for the plaintiff, and read to the jury by counsel.

Q. Have you got one of the blank forms for application for payments that are mentioned here, Mr. Converse?
A. We have them, yes.
Q. Have you it here in the court room?
A. I think it is among the papers at the office.

A recess of Court was taken at this time.

Q. Mr. Converse, have you one of the blank forms referred to in Plaintiff's Exhibit 11?
A. I have.

(The witness produces a paper.)

Mr. Paine: I offer that in evidence.
The Court: No objection, it is admitted.

The paper in question was then placed in evidence, marked Exhibit 12 for the plaintiff, and was explained to the jury by counsel.

96 Q. Mr. Converse, I show you an application dated December 30, 1911, for $5,654.00, directed to the P. J. Carlin Construction Company on a form like the blank form that you have just testified to, and ask you if that is a copy of an application that was sent to the P. J. Carlin Construction Company.

A. This is one of the twelve copies that I received from the Carlin Company and an application for payment is made thereon.

Mr. Paine: I offer this in evidence.
Mr. Wait: I object, if the Court please, to the admission of this as being any proof of its contents, merely as proof of the application.
Mr. Paine: That is the only purpose for which it is offered.
The Court: It is admitted for that purpose only.

The paper in question was then placed in evidence, marked Exhibit 13 for the plaintiff, and was explained to the jury by counsel.

Q. Now, Mr. Converse, did you subsequently to December 30 have any interviews with Mr. P. J. Carlin with regard to payment?

A. I did, about the first or second of February. I talked to Mr. Joe Carlin in his office in New York.

Q. State what took place at that conversation.

A. I don't recall anybody else being present at that time, but Mr. J. P. Carlin, in Mr. Carlin's office.

Q. Now will you state what took place at that conversation?

A. I explained to him that we had been down on the job almost a year and had received no money, we had made our applications for money and that I was there to get some and I must have it. After a considerable talk back and forth he gave me a check for some thirty-seven hundred dollars, thirty-seven hundred and odd dollars, and I was dissatisfied with the amount and I insisted that we must have a definite agreement as to the amounts that would be paid us, the units as to how they were to be paid, and Mr. Carlin called in a young man and dic-ated a memorandum and handed it to me and he stated that we would be paid in those units and that we would render our monthly estimates in those units, and I agreed to it and went out.

97 The Court:

Q. What was the date of that?
A. About February 2d, 1912, in New York City.

Mr. Wait: I object to the testimony and move that it be stricken out as immaterial and not within the contract or within the contract terms.

The Court: The objection is overruled.
Mr. Wait: Note an exception.

Mr. Paine:

Q. Now, I show you a paper entitled Schedule of amounts covering each branch of the work in construction Post Office and Court House Building at San Juan, P. R., and ask you to state what that is.

A. This is the schedule or the paper which Mr. Joe Carlin had made for me and handed to me in his office on about February 2d. I received this paper from him and subsequently rendered our applications for monthly payments on these forms.

Q. Is that the paper that he handed to you at the time that he made that statement?

A. Yes, sir.

Mr. Paine: I now offer that in evidence.
The Court: Any objection?
Mr. Wait: I do object to it and to the conversation as immaterial, as being an attempt to modify or alter a written contract and being dehors the terms of the contract and there being no consideration for any change or modification of the contract in this manner. There is no pleading that the contract was modified or altered or changed. It is not within the pleadings and I call the attention of the Court in connection with that to the opinion of the Supreme Court of the United States as to this language of paragraph 12, in which it is said that: "There is no clause, such as is frequently found in contracts of this character, that the amounts payable from time to time shall be ascertained and certified by the architect, and no units upon which it is to be determined." It seems to me you cannot here, modify, alter, change and add to a contract and change the means and methods of payment unless it is pleaded and unless there is a consideration.

The Court: The objection is overruled.
98 Mr. Wait: Note an exception.
The Court: The paper is admitted.

The paper in question was then placed in evidence, marked Exhibit 14 for the plaintiff, and read to the jury by counsel.

Q. Now shortly previous to that conversation, or under date of January 29th, did you receive this letter from the P. J. Carlin Construction Company (handing a paper to the witness)?

A. I did, I received that from the Carlin Construction Company from the New York office. I received it in Boston.

Mr. Paine: I offer that letter in evidence.
The Court: No objection, the letter is admitted.

The letter in question was then placed in evidence, marked Exhibit 15 for the plaintiff, and read to the jury by counsel.

Q. Now I show you a letter to the P. J. Carlin Construction Com-

pany dated January 30, 1912, and ask you if you sent that letter in reply to the letter just read.

A. I did from Boston to the Carlin Construction Company of New York.

Mr. Paine: I offer that in evidence.

The letter in question was then placed in evidence, marked Exhibit 16 for the plaintiff, and read to the jury by counsel.

Q. I now show you a letter dated February 6, 1912, to the P. J. Carlin Construction Company, signed Guerini Stone Company, and ask you if you sent that letter to the P. J. Carlin Construction Company?

A. That letter was sent under my direction.

Mr. Paine: I offer that in evidence.

Mr. Wait: No objection.

The letter in question was then placed in evidence, marked Exhibit 17 for the plaintiff, and read to the jury by counsel.

Q. Now will you explain to the jury, Mr. Converse, just what you meant when you said: "that our contract covers only two items of this schedule"?

A. The schedule handed to me by Mr. Joe Carlin had printed on it items, 1, 2, 3 and 4. Items 3 and 4 were all that applied to our work. The first item on the list was excavation and filing.

99 Q. Did you ever receive any reply to this letter from the P. J. Carlin Construction Company, denying your statement as contained in the first paragraph of this letter, that these units were adopted in accordance with his instructions to you?

A. We never did.

Q. Now, Mr. Converse, under date of March 9th did you make another application for payment to the P. J. Carlin Construction Company?

A. As I recall, we did.

Q. And I show you a letter to the P. J. Carlin Construction Company, dated March 9th, enclosing applications, and ask you if you sent that letter.

A. I sent that letter and the enclosures, and there was enclosed in that letter an application made out on a blank form such as I have testified was sent to me by the Carlin Construction Company?

Mr. Paine: I offer that in evidence.

Mr. Wait: I object to the letter and to the application as being no proof of the facts which it contains; as being only notice in the letter of the submission of the application, and the application merely as a notice that he applies for that amount of money.

Mr. Paine: That is the only purpose it is offered for, your Honor.

The Court: It is admitted with that understanding.

The letter and enclosure were then placed in evidence and marked Exhibit 18 for the plaintiff.

Mr. Wait: I object also to the reading of the letter to the jury because it contains self-serving declarations incriminating or impeaching the defendants for their conduct.

Mr. Paine: If the letter is in for one purpose, it is hard to see how it is not to be read to the jury, under the proper instructions of the Court.

Mr. Wait: That is the practice in some places and in other places it is the practice for the Court to review the letter and to exclude such parts as seem to be improper.

The Court: Let me see the letter.

(The letter in question is handed to the Court and the objection of counsel to the admission of same is read to the Court.)

Mr. Wait: I refer especially to the question of delays there, there being no proof whatever of it.

The Court: The letter may be read, subject to the order made on admitting it. I do not see how to divide the letter up. I will instruct the jury that the statements in it are not facts except in regard to the demand for the payment of money.

Mr. Wait: Note an exception.

(Mr. Paine then read the letter in question to the jury.)

Mr. Wait: I submit, if the Court please, that the Court can see the effect of that letter or the possible effect of it, and the jury ought to be instructed at this time and that all those declarations as to delay, nonpayment and holding him up should be called to the attention of the jury now.

The Court: That will be done as soon as the reading is completed.

Mr. Wait: The reading is completed I believe.

(Mr. Paine then read the enclosure in question to the jury.)

The Court: Gentlemen of the jury this letter is admitted in evidence and has been read before you, but it will have to be received with a considerable grain of salt in this respect. It is good evidence before you that a demand was made for a certain amount of money and that the plaintiff claimed that he had done the work authorizing that amount of money. To that extent it is good evidence. The recitals in the letter of past transactions, however, are not evidence of anything before you. You can readily see that a party could write a letter and put in almost everything he wanted, but it is impossible for the Court to strike out a part of the letter and let in another part of it. You will have to receive the whole letter, but remember that it is evidence before you only of
101 the fact of a demand of payment and that that demand is stated in the letter to be based upon a certain amount of work done, that is all. The other items will not be regarded by you.

Q. Now this enclosure dated March 9, 1912, was that on one of the printed forms submitted to you by the P. J. Carlin Construction Company?

A. Yes, that was our practice.

Q. Well I show you Plaintiff's Exhibit 12 and ask you if it was not on one of those printed forms.

A. Yes, it was.

Q. Was the amount of money demanded in this application on the printed forms calculated by using the units set forth in the memorandum which you said was handed to you by Mr. Carlin, which is in evidence, marked Exhibit 14 for the plaintiff?

Mr. Wait: I object. The paper is the best evidence and it is in.

Mr. Paine: The demand is made and now I am asking Mr. Converse if in arriving at the demand he used the units set forth in the paper.

Mr. Wait: No such units are given in the paper. It is not figured out in the units nor are the quantities stated in the application.

The Court: As I understand, the objection is not that the question is leading.

Mr. Wait: The objection to the question is, first, that the paper shows that they were not figured and estimated at unit prices, and furthermore, that the witness cannot be asked whether they were figured that way or not unless there is a foundation to show that he knows or that he figured it.

The Court: Yes, that is correct. The objection is sustained at the present stage.

Q. Now, Mr. Converse, at the time that you made out this demand on the blank form which had been submitted to you, did you have before you the quantities or the amount of work which had been done on the job here in San Juan?

A. I did.

Q. Did you take those quantities and multiply them by the units as set forth in the schedule of amounts handed to you by Mr. Carlin, which is in evidence as Plaintiff's Exhibit 14, and did you
102 put the result of multiplying the quantities by the units on that application?

Mr. Wait: I object because the quantities were measured and stated and were made out here in San Juan. Before this witness can testify to the quantities, it must be shown that he measured them or counted them.

Mr. Paine: I am simply offering this at this time to show that we complied with the requirements in making the demand; that we made it on the form; that we made it on the agreed units and that the calculation was correct. I am going to later show that the basis used for the calculation is correct. Therefore I now offer it for that purpose, subject to its being connected up later as to the amount of work actually done, so I offer it now on those terms and for that purpose.

Mr. Wait: I have a right to know the quantities and the prices and I insist on his giving the quantities and the prices that he used.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

(The last question is read to the witness.)

Mr. Wait: I object further that "those quantities" does not apply to any quantities stated.
Mr. Paine: His previous answer stated that.
The Court: The objection is overruled.
Mr. Wait: Note an exception.

A. I did make them.
Q. Now as an additional enclosure in this letter of March 9th did you send to the P. J. Carlin Construction Company this letter dated March 9th, signed by the Guerini Stone Company, which I now show you?
A. I did.

Mr. Wait: If the Court please, may I ask the witness a question?
The Court: Yes.

Mr. Wait:

Q. Mr. Converse, do you know positively that this was enclosed with the other letter?
A. Do I know what?
Q. Do you know that this was enclosed with the other letter, Exhibit 18, the last letter that was introduced?
A. Yes.
103 Q. You do know it?
A. Yes, I do know it.

The Court: No objection, the letter is admitted.
The letter in question was then placed in evidence, marked Exhibit 19 for the plaintiff, and read to the jury by counsel.

Mr. Paine:

Q. Now the formal application that you refer to in this letter was this formal application that was dated March 9th?
A. Yes, that was the date, March 9th.
Q. I show you a letter dated February 24, 1912, prior to this, to the P. J. Carlin Construction Company, signed Guerini Stone Company, and ask you if you sent that letter.
A. I did. That letter was sent under my direction.

Mr. Paine: I offer it in evidence.
Mr. Wait: No objection.

The letter in question was then placed in evidence, marked Exhibit 20 for the plaintiff, and read to the jury by counsel.

Q. Now I show you a telegram dated March 13th to the P. J. Carlin Construction Company, signed Guerini Stone Company and ask you if that was sent by you to the Carlin Construction Company.
A. That was sent by me March 13th.

Mr. Paine: That is offered in evidence.
The Court: No objection, the telegram is admitted.

The telegram in question was then placed in evidence, marked Exhibit 21 for the plaintiff, and read to the jury by counsel.

Q. Now, Mr. Converse, was there any unit provided in your contract with the Carlin Construction Company, on which you were entitled to demand payments, before this conversation that you have testified to with Mr. Carlin?

A. There were no units mentioned for payments in the contract, except the options. There was no unit applicable to our concrete work stated in the contract. The contract provided, that the payment should be made in monthly payments in amount not to exceeed eighty-five per cent of the cost of the work. In reply to this telegram dated March 13th, I received this telegram from the P. J. Carlin Construction Company dated March 13th, 1912.

Mr. Paine: It is offered in evidence.

104 No objection to the admission of the telegram in question and it is placed in evidence, marked Exhibit 22 for the plaintiff, and read to the jury by counsel.

Q. Now did you go to New York and have an interview with the defendant company in reply to that telegram?

A. I did, and I saw Mr. Carlin, Sr., and a young Mr. Carlin who I understand is secretary of the company. That was in their office in New York. That was somewhere near the middle of March. I told Mr. Carlin that we were thoroughly dissatisfied with our payments; that we had been compelled to expend a large amount of money in actual expenses in San Juan and that we had not been paid in accordance with the terms of the contract, the units that had been agreed on with his son. He said his son was away at the time, and he gave me a check for $674.00 or something of that kind, and I expressed my dissatisfaction with it, but I took the check as we were hard up. I told him we had spent a large amount of money down here. So I took the $674.00 and went back to Boston with it.

Mr. Paine: I offer this letter in evidence.

Mr. Wait: If the Court please, I think the greater part of this letter is admissible perhaps, but there are some self-serving declarations along the same line, charging us with delay.

Mr. Paine: We can't get a letter of this kind without something of that sort.

Mr. Wait: I guess both parties were trying to make a case in letters—I won't say that one any more than the other—but they are not facts and I submit that they should not go to the jury. There is considerable in there which I can see is material.

Mr. Paine: I am not trying to make a case by letters, but there is material matter here and I want to offer this under the same conditions as before, that in so far as it contains any self-serving declarations the Court may instruct the jury that the letter is not to be taken in evidence for that purpose.

The Court: I will admit the letter under the same ruling.

105 Mr. Wait: Your Honor will grant me an exception?
The Court: Certainly.

The letter in question was then placed in evidence, marked Exhibit 23 for the plaintiff, and read to the jury by counsel.

The Court: Gentlemen, that is admitted on the same principle that the other letters were and you will take it in the same way. What is recited in the past is not evidence before you. What is claimed in the present is evidence before you.

Q. Now, Mr. Converse, going back to shortly after the last conversation, which you testified to, in New York, and under date of April 25th, I ask you if you sent this letter dated April 25th to the P. J. Carlin Construction Company.

A. I wrote that letter to the Carlin Construction Company.

Mr. Paine: I offer this letter in evidence.

Mr. Wait: I object to the letter as being quite replete with self-serving declarations. My friend says he only wishes to show that he offered to arbitrate. I have no objection to his offering that clause where the offer to arbitrate is given but I do object to his reading this manufactured letter writing.

Mr. Paine: I object to that. It is all right to state that it may be manufactured, but to state that it is I object to. As I have stated, in all these letters which contain material matter, there are some parts coming under the class of claims rather than statements of present fact, and it is necessary for me to get in my relevant testimony. I am going to offer this letter in evidence under the same conditions as I have offered the other letters.

Mr. Wait: The offer to arbitrate is all embodied in one sentence on the bottom of the first page and the top of the second page, and, if that is the object of the offer, I request that counsel separate that part, which can easily be separated.

Mr. Paine: I will go through the letter and if that is the
106 fact, I am perfectly willing to read just that part. If I read that sentence there is no objection?

Mr. Wait: No.

Mr. Paine: Then, your Honor, I will simply read that sentence.

The letter in question was then placed in evidence, marked Exhibit 24 for the plaintiff, and the following sentence therefrom was read to the jury by counsel: "We must insist upon the cost of these delays being arbitrated at once in accordance with the terms of the contract and we can only proceed with the contract on the basis that the damages be now adjusted, so that we can proceed with our work on a new and fresh start."

Q. Now, Mr. Converse, did you go to New York and have another interview with the defendants?

A. I did. After this last interview that you have described, in the early part of May, around the 10th. I saw there Joe Carlin, I think his father and Mr. John Carlin came in later. There were

several in the office. I saw principally Mr. Joe Carlin and talked to him. This was in his office in New York City.

Q. Will you tell the jury what took place at that interview?

A. I complained that we had not received payments in accordance with the terms of the contract or in accordance with the agreed units with his son, and that we had spent a very large amount of money and I wanted to be reimbursed for the money that we had expended in those delays. After considerable talk, Mr. Joe Carlin said: "Well, how much have you spent?" I stated that I hadn't the books there and could not give the exact amount, but approximately $35,000.00. Mr. Carlin immediately responded to that: "If that is it, you know what you can do." And that about ended the conversation and I got up. Mr. Bliss, my partner, was present at that conversation.

The Court:

Q. What was the date of that conversation?

A. That was about the 10th or 15th of May.

Mr. Paine:

Q. Now, Mr. Converse, have you stated to the jury all the amounts of money that you received from the Carlin Construction Company in payment on account of your work on the San Juan Post Office?

107 A. I have. We received two checks, one for approximately $3765.00 and another check for $674.00.

Q. One thing more about that interview, Mr. Converse, was anything said about arbitration?

A. I stated just as I had in previous letters that I was perfectly willing to arbitrate the differences and have the amounts settled. No reply was made to that. We didn't get any more money at that interview.

Q. Now, Mr. Converse, I show you a letter dated May 22, 1912, to the P. J. Carlin Construction Company from the Guerini Stone Company and ask you if you sent that letter.

A. I did.

Mr. Paine: I offer that letter in evidence.

Mr. Wait: This, if the Court please, is the crescendo of declarations and statements. We object to it as being self-serving declarations, and to every part of it except that part which starts: we hereby notify you, etc., and to the end wherein it states: that we shall hold you liable for the damages, constituting three lines only of the last paragraph, which is a notice to us of a termination of the contract.

Mr. Paine: As to the grounds specified for our taking this action, the Courts have always held that you have got to specify your grounds and if you specify some grounds and do not specify others, you are in difficulty if you want to set them up thereafter.

Mr. Wait: It is a sort of a resumé of the color, complexion and atmosphere in which the plaintiffs regarded the defendants.

Mr. Paine: Just so that my friend cannot accuse us of that sort of thing, although I think it is all proper evidence, I will leave

it all out except the last paragraph which states the grounds for our action.

Mr. Wait: And I will have no objection to that paragraph if he will limit the offer to what he claims. That is what he claims.

The Court: So much of the letter is admitted.

The letter in question was then placed in evidence, marked Exhibit 25 for the plaintiff, and the last paragraph thereof was read to the jury by counsel.

108 The Court: Gentlemen, I suggest on both sides that in such cases you had better mark in the margin what does go in.

Q. Mr. Converse, did you ever make an estimate of the cost of the work included in your contract with the P. J. Carlin Construction Company on this San Juan job?

A. I did.

Q. Will you state to the jury how you went about making that estimate and what it was?

Mr. Wait: I object because it does not show at what time this question is aimed at and however he made his estimate before he came down here and made an examination is not material. That he must make it in the light of the circumstances and the conditions which actually prevailed, not what he estimated that it might or should or would have cost, but to make an estimate under the market conditions at this place of what the actual cost was. I will further object that there is no proper qualification shown to estimate the cost of this building because this is the first job that Mr. Converse ever did of this kind, class or character of artificial stone to be cast and moulded and set, and of this shape and style, and it is his first experience in a foreign country like San Juan, and therefore he cannot be an expert on that line of work.

(The question is read for the Court.)

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. We took the drawings, and I had the total quantities made up. That is the first thing to do is to take off the length, breadth and thickness of the walls to determine the cubic contents, for instance, in cubic feet and then transfer it into cubic yards. We paid $1.83 a barrel for our cement here. (May I have a sheet of paper?) After determining the cubical quantity, that is, so many cubic yards of concrete in this building, the cost of materials would be the first thing that would come up. The cement cost $1.83 a barrel. To a cubic yard it took a barrel and a half. That meant $1.83 and
109 $0.92. Next was the sand. The sand cost $1.80 a yard and there was half a yard of sand. That was $0.90. The stone, crushed stone, and water were $2.20 a cubic yard, for the water and stone delivered at the building site. That made a cost for the materials which go into a cubic yard of concrete in this building $5.85

on the site here. We then take up the question of forms which we figured at $5.40 a yard in the following manner. After examining the drawings and getting what was an average type, we took a cubic foot of concrete, that is, a wall twelve inches high, twelve inches thick and twelve inches long. That would require forms on two sides, two square feet of forms. Our lumber here cost us $30.00 a thousand, that is three cents a square foot. We are able to use those forms that are made, they are made up like panels or barn doors, we can use those forms over three and four or five times. We take as an average three times. That is a minimum, so that in using that lumber over three times, that makes the forms cost us one cent a square foot for the lumber. There would be four feet of lumber; we take four feet of lumber to the square foot of form surface, that is, we would have a seven-eighths inch board, we would say, twelve inches square. Then we have to account for the braces to hold it there, so we estimate not just one square foot of lumber, but four. That makes our lumber four cents for a square foot of surface forms. We take four cents for the labor of making and placing the first time. That is forty dollars a thousand. Then we take one cent for each time it is reset. That brings it up, counting the three times that we use it, to ten cents a square foot on each side of this wall twelve inches thick. So that cost us twenty cents per cubic foot for both sides. Now there are twenty-seven cubic feet in a cubic yard of concrete, and multiplying that by twenty-seven gives us $5.40 a cubic yard for the forms for doing this work. Our cost of mixing, placing, tools and runways and that sort of thing we figured and were able to produce at $2.50 a cubic yard. We then had what is called overhead expense, that is, Mr. Follet had to be sent down here and Mr. Guerini had to be sent down here and their salaries had to be paid, and my first trip down to get things started, and certain freight on machinery. We took those different items and put them into the yardage which came to two dollars a cubic yard for the overhead expenses. That made the cost of our concrete $15.75 a cubic yard. That is the way we made up this estimate. Mr. Guerini, whom we paid a salary to, was an expert moulder in clay and making plaster moulds and pouring concrete into those moulds. Now, you notice that there are a few ornaments around on the building, the capitals on some of the columns and the eagle. Those were to be moulded in the shop and then taken as a stone and set in the building. A large portion of these walls and the outer walls was to be poured in position.

Mr. Wait: I object to that and move to strike it out. I am going to prove to the contrary. He is telling the jury a fact of which he has no knowledge.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. (Con.) This is my method of making up this estimate. Now, we figured that there was about 183 tons, or 182, I have forgotten, 182 or 183, of these pieces of stone that we would cast in the shop.

We figured that would cost three dollars a ton to take it and put it up in position and set it. That made a figure of $546.00. Our total yardage of concrete, 3298 cubic yards multiplied by $15.75, plus $546.00 plus $523.00 made a sum of $1069.00, which added together gave us a cost of $53,012.00 . That made up my estimate.

An adjournment of Court was taken at this time until 9:30 a. m., June 2, 1916.

June 2, 1916.

Direct-examination of the witness H. P. CONVERSE.

Continued by Mr. Paine:

Q. Now, Mr. Converse, at the close of your testimony last night you had stated to the jury the total number of cubic
111 yards of concrete that had been placed according to your contract. Will you repeat that figure?

A. Three thousand two hundred ninety-eight, and I had estimated that the total cost to my company of doing that work was $15.75 per cubic yard, plus two factors amounting to $1069.00, and making a total of $53,012.00.

Q. Now, before subtracting that from the total contract price were there any other elements that would have entered into the profits that you would have made under your contract?

Mr. Wait: I must object to that. There must be some foundation for it.

Mr. Paine: I would ask you to specify what you mean by no foundation for it. There is no objection to the qualification of the witness as an expert.

Mr. Wait: Yes, I did object to that from the inception.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. I took to cover any possible contingencies and added $2,000.00 to that cost of $53,012.00 to take care of any overlay that we might have to expend over what we expected it makes a total of $55,012.00.

The contract price was $64,750.00. The difference between those two figures is $9,738.00.

Q. Now, then, in that estimate you took into consideration the cost of labor?

A. I did.

Q. Was that based on your knowledge of the actual cost of labor in San Juan on this job?

Mr. Wait: If the Court please, I object. I understand this is an estimate made of the cost of this work upon which he based his figures and upon which he based his price.

Mr. Paine: My question, as I remember it, was directed to a present calculation of the cost of doing the work. The exami-

nation does not disclose that, to the best of my recollection and my notes.

The question is read for the Court.

The Court: The objection is overruled.
112 Mr. Wait: Note an exception, please.

A. It is.

Mr. Wait: I renew my objection and move to strike out on the further ground, if the Court please, that this witness neither employed the labor in San Juan nor paid the labor nor had any knowledge so far as the testimony shows, of what the per diem or what the actual labor that went into this building was, because we are going to prove some things in connection with this labor disbursement and the employment of the officials and clerks or representatives down here which will disclose that all these payrolls and work did not go into this building.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

Q. Have you been in San Juan during the progress of this job?

A. I have; I was here the first five to six weeks in starting the job. I was here about the latter part of May and then I was here again in February of the following year when a large amount of the work was going on. I was familiar with the prices which we were paying to our men and fixed and was familiar with the wages of the men that we sent down from the states. I got my labor for this job largely of old crews from the states excepting the labor which we call lumping labor and native carpenter labor somewhat. I am familiar with the cost of cement in San Juan. The cost of cement which was included in my estimate is based on the cost in San Juan. I am familiar with the cost of sand in San Juan, and the cost of sand on which I based my estimate that I have testified to is the cost in San Juan. It is or was at that time. The same thing is true with regard to the lumber and to the crushed stone and all the materials that went into our work under the contract and all the labor that went into our work under the contract. The same is true with regard to all machinery that was used under the contract and with regard to the overhead. I am familiar with the machinery that the Guerini Stone Company was using on the job down here. The Guerini Stone Company rented it from H. P. Converse & Company.

113 Q. What rental did H. P. Converse & Company charge for the machinery?

Mr. Wait: We object to what was charged for it. We cannot base our case on proof of that kind.

Mr. Paine: That obligation is a part of the damages in this case.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. We charged them fifteen dollars a day for the machinery.

Q. Now, do you know the total amount of rental that was actually charged the Guerini Stone Company for the rental of that machinery, or have you a memorandum there from which you can refresh your recollection?

Mr. Paine: You had better refer to the original memorandum.

A. (After looking through some papers.) I have it.

Mr. Paine: Are you going to make me qualify this memorandum?

Mr. Wait: See what your question is.

Q. Can you testify the total amount that was actually charged the Guerini Stone Company by H. P. Converse & Company for the use of that machinery?

A. I can.

Q. What is it?

Mr. Wait: I object. It is no proper measure of damages.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. It is composed of two bills to the Guerini Stone Company, one for 208 days at $15.00, making $3,120.00; and one for 179 days at $15.00 a day, making $2,685, making a total of $5,805.

Q. Now, can you tell the jury what those tools consisted of?

Mr. Wait: The same objection, if the Court please; no proper measure of damages.

The Court: The objection is overruled and exception allowed.

114 A. Yes, those consisted of a concrete mixer, grout mixer, concrete hoist, sets of moulders' tools, drills and stone points transit, pliers, shovels, hoes and spades, power saw two power saws, column clamps and miscellaneous tools. There were two sets of the moulders' tools complete.

Q. Now, Mr. Converse, how many days did you actually spend on the job in Porto Rico in connection with the work of the Guerini Stone Company?

Mr. Wait: I object to that as immaterial. It is not proper measure of damages and no proper charge to the defendants.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. I spent sixty-six days. My time on the job actually charged to the Guerini Stone Company.

Q. At what rate?

Mr. Waite: The same objection, if the Court please, and an exception.

The Court: The objection is overruled.

A. Twenty-five dollars per day.

Q. And how much is the total of that?

Mr. Wait: The same objection, if the Court please.

The Court: The objection is overruled and exception allowed.

A. There were seventy days in all at $25.00 a day, I make that correction in the number of days, at a total cost of $1,750. I know the amounts that were actually expended by the Guerini Stone Company in Boston in connection with this job. I have a memorandum here from which I can refresh my recollection as to the amounts.

Q. Will you produce them?

A. I can testify to the amount of invoices paid at the Boston office on account of this contract.

Q. What is the amount?

Mr. Wait: I object to them as being immaterial, and not proper measure of proving damage or profits. They are not a proper measure of any damage for a breach of contract.

The Court: I think the examination has progressed far enough for counsel to tell me his theory of damages. I have been waiting for evidence to get in so that I could get the drift of it. Perhaps it would be better at this point to let me know your theory on that point.

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The jury is excused from the Court room during the discussion.

Mr. Paine: In our case, the Supreme Court of the United States in passing on my requested charge to the jury, which read as follows: "In estimating the recovery to which the plaintiff is entitled, if you find he is entitled to recover, you should consider the reasonable expenditures incurred, the unavoidable losses incident to stoppage, the amount of work actually performed the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract." The Supreme Court in commenting on that requested instruction, said: "Had the requested application of these elements of damage been confined to the case of plaintiff being found entitled to recover upon the theory that the contract was rightfully terminated by the notice of May 22, 1912, we assume it ought to have been granted." In other words, if your Honor qualifies this charge in this way, "This is on the assumption that you find that the contract was totally broken by the defendant," then that charge is proper. I haven't my papers here because I didn't anticipate that this point would come up at this time.

The Court: It might possibly better come up later, but it seems to me this is a good time. It is sometimes impossible to rule on a single question unless I know the tendency of the examination.

Mr. Paine: I don't seem to put my hand on the particular quotation, but I can assure your Honor that there are Supreme Court decisions holding that the proper measure of damages in cases of this sort are the actual expenditures incurred by the plaintiff in and about the work plus the prospective profits which he might have made. In other words, we are entitled to be made whole as to our losses, and our losses are clearly the money which we have spent on our work under the contract, and, in addition to that, if the contract was breached by the defendant, we are entitled to such profits

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as we might have made under the contract. This testimony now sought to be brought on is as to the actual expenses incurred on this work. I have some citations here and I can get the books if your Honor wishes, which hold that the measure of damages is the actual losses and the prospective profits under the contract if the contract was broken by the defendant.

The Court: What is in my mind is this. Take this contract, a $64,000.00 contract, something like that. It was estimated that the cost would be $55,000.00 therefore the difference between the two would be the profit. That is profit. Put that to one side. Now this contract was broken, that is, on the theory of the plaintiff was broken at some time, some point. Your question seemed to be directed to how much was spent by the plaintiff up to that time and in connection with the breaking of the contract. Now, suppose you spent a whole lot of unnecessary money, would that be an element of damage? How could one tell whether it is necessary or whether it is not necessary? Would the fact that you actually spent it be a criterion?

Mr. Paine: I have a quotation on that point of the Supreme Court, which says that if the plaintiff shows the actual expenditures, then the burden shifts to show that the expenditures were improper. The question might arise whether they were properly connected with the contract. As a matter of fact, I do not think that the question can arise as to whether or not there is any relation between the actual value of the work done and the expenditures be-
117 cause of course in our case the claim is that the expenditures were larger than the actual value of the work done because of the fact that there were delays which kept us down here and our pay-rolls going on, etc., which increased the expenses in producing a given amount of work, and that is why the actual expenditures exceeded the estimated expenditures, but I understand the rule to be that we are entitled to show the actual expenses we had on the job. Once we show that, that is prima facie our loss. If the defendant can show that some of those expenses should not properly enter into the amount of our losses, then the defendant is entitled to do so, but prima facie we are entitled to show just what we spent in performing our contract.

The Court: I would be glad to hear you on that.

Mr. Wait: My idea first is that which the Judge expressed. It is wholly immaterial to the defendant in this case as a measure of damages by which he shall pay money, as to how much the plaintiff expended. And before he is entitled to show how much he expended he has got to show that it was expended strictly in accordance with his contract and that it was expended strictly and entirely upon what the Court shall determine was necessary under the contract, and he should also have his personal knowledge of these expenses and for what they were paid. No proper foundation has been laid with this witness for such testimony. Just as the Court says, suppose that this witness paid five or ten times more than he ought to for this work, suppose that he had agents and representa-

tives who were not economical and reasonable and fair or honest even, surely the defendant would not be taxed with anything of that kind. Now, as to the burden of proof, it is unquestionably the rule of law that the plaintiff must make out his case and he must make it out with proper evidence and according to law and according to the measure of damages that is applicable. My objection to
118 that is that he is not doing that, that is, he is not showing the proper measure of damages, nor is he showing it with a proper witness, nor with a qualified witness.

The Court: To state exactly what is in my mind, it is, when a contract is broken, there are two elements of damage. One would be the profits. That is fairly clear so far. The other would be the expenses which the plaintiff has been put to in carrying out the contract and the expense he was put to immediately resulting from not being permitted to carry out the contract. You might say that there are three elements of damage. That seems to be so.

Mr. Wait: Your Honor, will you repeat those three elements?

The Court: One would be profits, the other would be what was expended in carrying out the contract up to the time of the breach and the other would be what the plaintiff had to pay out due to the exact result of the breach of the contract itself.

Mr. Wait: Isn't that No. 2?

The Court: Yes, you can put in two.

Mr. Wait: I didn't know any third element. Pardon the interruption.

The Court: It is simply dividing the second. The point made just now by Mr. Paine that the burden of proof is shifted when the plaintiff has proved that he has paid out certain money, that I am not at all clear on. That is not my impression. My impression is that the plaintiff has got to prove as he goes along what he has paid out under the contract. I do not understand that there is any shifting of burden of proof. If there is, I would like to be cited the authorities.

Mr. Wait: And further, the Court will appreciate that there are a great many breaches stated or mentioned and the amendment, I believe brings in still further ones. There are some breaches
119 for which he may have prospective profits and some for which he may not.

The Court: Yes, I did not mean to pass on that.

Mr. Paine: That would have to be taken care of by your Honor's instructions later.

In the case of the United States v. Behan, 110 U. S. 338, at the bottom of page 343 and top of page 344, after reciting the rule as to the measure of damages, the Court says: "We think that these views, as applied to the case in hand, are substantially correct. The claimant has not received a dollar, either for what he did, or for what he expended, except the proceeds of the property which remained on his hands when the performance of the contract was stopped. Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears they were incurred

in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the government should have proven this fact." The government was the defendant. "It will not pe presumed." In other words, it will not be presumed that the expenditures were foolishly or unwisely, incurred. In other words, my contention is that if these expenditures were made on the job, then the question of whether they were foolishly expended is for the defendant to show. The fact that we spent it on the work is prima facie proof that the work required that expenditure. However, I think I will go into that a little bit with the witness and have him testify what the expenses were for.

Mr. Wait: This might very well be if on this case on the original trial, as I remember, the government had stood by and allowed that testimony to go in without objection, then the government should unquestionably have proven that it was foolish, but where the
120 question is raised at the admission of the testimony, this rule could not prevail on the most ordinary principles of law, which are that the plaintiff must make out his case. Suppose at the end of the case I should simply move to dismiss and not put in any case, and he has not made out his case properly, then the case would certainly fall. And this opinion does not show what attitude the government took when this testimony was offered. And if it were offered in the United States Court of Claims or offered in a good many District Courts where the testimony is taken without even a judge or a master, but taken by deposition, and then a brief prepared, or memoranda or findings of fact and conclusions, and argued, as is the practice in the United States Court of Claims and patent cases, then, these objections not being made at that time, as is the rule and practice we would understand this decision perfectly, but this decision is entirely contrary to all the acceptance and understanding of the principles of law.

The Court: I think I should hold, if the point is presented directly, that the burden of proof does not shift. It has not been the practice in this Court and I am not at all convinced that that Supreme Court case so decides in general. It might have been true in that particular case.

Mr. Paine: I think it is better for me, since I can, to prove what they were anyway.

The jury is brought back to the jury box.

Mr. Paine: Now, your Honor, in view of Mr. Wait's objection, I think I will add a little bit to the qualification as to the nature of the memoranda from which he is refreshing his recollection.

Q. Were these memoranda made under your supervision, Mr. Converse?

A. They were and at the time they were made I was familiar with the facts set forth.

121 Q. Did you know at the time those memoranda were made, that they were correct?

Mr. Wait: I object to that. He must show who made them and

how he knows that they were correct, and if he did not make them he cannot know that they are correct, and I am satisfied that he did not make them.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. I did.

Q. Are you able to testify of your own knowledge as to the facts set forth in the memoranda, by refreshing your recollection from the memoranda?

Mr. Wait: Note an objection and an exception.

A. I am.

Q. Now, did you testify as to the amount of the invoices paid at the Boston office?

A. I think I did.

Q. Will you state it again?

Mr. Wait: I object on the ground stated.

The Court: The objection is overruled.

Mr. Wait: Grant me an exception.

A. I have before me.

Q. Give me the amount.

A. $11,135.13.

Q. Now, tell the jury what those expenditures were.

A. Those expenditures were for receipted bills which I hold in my hand and were for blue prints, for drawing paper, the American Glue Company for two barrels of glue that were sent to Porto Rico to be used in connection with the moulds, teamster's charges for teaming in Boston on the tools, etc., for shipment, the Metropolitan Steamship Company's bill for transportation, the Spaulding Blue Print Company for blue prints, Harrington King for freight paid on bale of hemp to the Guerini Stone Company, one bale of hemp, to Alfred H. Post for forwarding charges, to Spaulding Blue Print Company for drawings and blue prints, the Hartman Wright Company for shellac to be used in connection with the moulds for making the concrete, Eastern Drug Company for Silicate of potash, a barrel. That is used in connection with the concrete in the
122 moulds. One roll of tracing cloth to the Spaulding Blue Print Company, telegraph and telephone charges in the North Eastern Telegraph & Telephone Company, to the Carborundum Company for materials, $40.44, Postal Telegraph & Cable Company, the Western Union Grossman, teamster, for teaming materials to the freight station in Boston, North Eastern Bolt & Steel Company, North Eastern Telegraph & Telephone Company, E. Venord & Company for the column cases which were made for the two columns down in front here, the moulds, Postal Telegraph & Cable Company Grossman, teamster, for teaming freight to the station; Western Union Telegraph Company; F. W. Norris & Company, travellers' insurance on men actual payroll. This is the insurance which we carried on our men. If they are hurt and sue us

for damages and collect anything, they collect it from the Insurance Company; John S. Emery & Company for freight; Postal Telegraph Company; these are mostly small items; Massachusetts Bonding Company, bond executed in favor of the Guerini Stone Company; Spaulding Blue Print Company; Samuel Wall for letter heads. Red D Line Steamship for freight charges. This is Bliss, Dallett & Company General Managers for the Red D Steamship Line. Spaulding Blue Print Company. That covers the total. The materials which I have mentioned in testifying were used in connection with the job on the post office building here and the freight were paid on materials sent here for that job. The teaming was paid on materials sent here for that job.

Q. Was the payroll for the men who worked on that job?

A. It was and the telegrams and telephone messages were in connection with work on that job.

Q. And were all of the items composing that amount paid solely in connection with work for the Guerini Stone Company?

A. They were for work on the job on the post office building in Porto Rico.

Q. Now, can you testify as to the amount, can you give the amount of the freight and passenger fares paid at the Boston Office on account of materials and men sent to Porto Rico in connection with the work on the post office and federal court building in San Juan?

A. I can.

123 Q. Will you state the amount?

Mr. Wait: Objected to as not the proper measure of damages or a measure by which damages can be determined and not being any part of the building structure and not being justifiable charges either against the defendants or for their account.

Mr. Paine: There is nothing in our contract that binds us to employ all our labor here; as a matter of fact, we couldn't get it here.

The Court: Was it not your business to do the work here?

Mr. Paine: Yes, indeed.

The Court: Is it not immaterial whether you got them from Italy or where?

Mr. Paine: I don't think it is. We had to do the work and our expense in doing the work and getting ready for it are proper expenses in doing the work. If we paid more by getting men from the States for the work than we could have gotten them for here, then we lost, but they are necessary, legitimate expenses.

Mr. Wait: I can see what we are coming to and I don't want to get the Court and my friend into trouble because we would like to end this litigation and not come back here again. On the prospective profits, we have gone at this thing one way and the witness has gone and testified to a great extent and measure that the prices which he used in determining his prospective profits were prices and expenses made in San Juan. Now, we have not taken that as a basis of measure of damages in one way. They are interlaced unquestionably, but now we depart from that method and we go to Boston and we go to New York and we adopt prices there which are totally different and

we add freight, etc., and we get a totally different measure of damages, and they employ men and they want to charge for bringing them down here, and also the question comes up whether these defendants can be reasonably charged for six to ten trips of Mr.
124 Converse down here and whether my client can be charged with trips back and forth of boss carpenters and of civil engineers who were sent down here and stayed ten days and didn't like it and went back, or for some other reason, and I don't think those are proper measure of damages. They take one measure of damages at San Juan one moment and then we shift to another scene and take another measure of damages of something different.

Mr. Paine: We are not using two different measures of damages. We are limited to estimating what it would have cost us if we had been allowed to proceed without delay, and subtract that from the contract price, and we can only do that by taking our knowledge of what it did cost us. Mr. Wait is laboring under the misapprehension that Mr. Converse did not include in that estimate of the cost, the cost of getting the labor down here. There is the question of profits which is the contract price minus the amount that it should have cost to do the work, and the question of damages, which is the amount which we had to actually expend on the job. Of course we had to expend more on the job than the estimate, because of the delays, and if by reason of the defendant's delays or the final stoppage, the defendant's breach, it results that we had spent so much that it is more than our estimate, and there is a large difference between the actual amount spent and the amount we estimated we would expend so as to make a profit, that is entirely different. Now, if in going through these items, there are items which are not properly charged, they should be struck out, but as I understand Mr. Wait's objection, it is to the whole testimony.

Mr. Wait: Mr. Wait's remarks were confined and limited to his objection to the question.

The Court: The objection is overruled. It seems to me that apart from the ground on which it is offered, it might be legitimate
125 another way. There are certain profits claimed and the elements making up the profits are certain estimated expenses. If it is shown that those expenses are larger for having to send men here, it may be that this evidence is legitimate in mitigation of profits. I do not know, but at all events it will be admitted.

Mr. Wait: Note an exception.

Q. (The last question is read to the witness.)

A. Eleven hundred seventeen dollars and twenty-three cents for transportation charges of freight and men in connection with your contract on the new federal building in San Juan. This is a bill of the H. P. Converse Company to the Guerini Stone Company, O. K.'d by its President.

Q. Can you give the items of that?

A. I can; I have the cancelled checks. Of each check? They are for the New York & Porto Rico Steamship Company, February 6th, $80.00 February 18th, New York & Porto Rico Steamship Company,

$50.00; April 12th, New York and Porto Rico Steamship Company, $12.24; April 18th, New York and Porto Rico Steamship Company $30.00; April 21st, these are all 1911, $3.00 to the New York & Porto Rico Steamship Company. May 2, 1911, $3.18, New York and Porto Rico Steamship Company. May 10th, to New York and Porto Rico Steamship Company, $217.00; November 17, 1911, New York & Porto Rico Steamship Company $75.00; December 15, 1911, New York & Porto Rico Steamship Company $75.00; December 28, 1911, New York & Porto Rico Steamship Company, $50.00; December 28th, New York & Porto Rico Steamship Company, $70.00; January 5, 1912, New York & Porto Rico Steamship Company, $25.00; January 17th, New York and Porto Rico Steamship Company $27.06; January 17th, 1912, New York & Porto Rico Steamship Company, $25.00; February 14th, 1912, $99.00, New York & Porto Rico Steamship Company; March 7, 1912 to New York & Porto Rico Steamship Company, $213.75 making a total of $1,117.23. Those amounts were spent for freight and transportation of men. Those men actually went to Porto Rico in connection with the work on the post office building.

126 Q. Can you point out whether any of those charges include your own fare? If you can't remember off-hand never mind.

A. I can't identify a particular check.

Q. Do you know whether your fares are included in those checks?

A. I know that the fares for my first trip down here are not included. I made two other trips.

Q. Now do you know the amount of payroll paid at Boston on account of laborers employed on the work on the post office building at San Juan?

A. I do.

Q. How much is it.

Mr. Wait: I object, if the Court please, no proper foundation and it is not a proper measure of damages, also it should be shown that the witness paid it himself or that he knows that it went, of his own knowledge, to these people.

Mr. Paine: He says that he knows.

Mr. Wait: His saying that he knows doesn't make it out. There should be a foundation laid for it.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. There are several items. I will take them up in order. February 16th, the sum of $1,580.00, payroll, paid on account of Guerini's services but paid to his wife. His wife was left in the States and we were to pay her thirty dollars a week, reserve that out of his salary and forward it to her, so that we mailed to her checks amounting to $1,580.00, and I have the cancelled checks in my hand. We paid Mr. Guerini a salary of $72.00 a week; we paid him $42.00 down here and the balance to his wife; $30.00 a week to the wife. There was a portion during January and February paid to A. Guerini in Boston, $509, between Feb. 3d and Feb. 9th, 1911. Those are the dates of the two checks. That just before he started down here on the

job. There was a similar instance in the case of Matthew Eyre, one of the stone masons we sent down, we forwarded a portion of his pay to his wife, amounting to $120.00, and I have here checks amounting to $120.00, which we forwarded to Mrs. M. Eyre and which have been cancelled at the bank, all properly endorsed.

127 The next item is to cash advanced to Mr. A. C. Lootz, January 29th, 1912, $336.56. Also a similar case of Mrs. Frank Russell, who was the wife of one of the men we sent down here. I have the bill dated, March 20, 1912, for $249.00 and the cancelled checks for that amount. I think that covers all. The total amounts to $2794.56. All of those men actually went to Porto Rico and worked on the job in the federal building at San Juan. They were employed for the period of time covered by the amounts paid them by the Guerini Stone Company.

Q. Now about the time that you stopped setting granite in Porto Rico, did you have any conversation with Mr. J. P. Carlin with regard to the granite setting?

A. We did. That was about February 1st, 1912, I think. That conversation was in New York. I stated that we had set practically all of the stone that was down here. We had set all that could be set, and that it had come in such intermittent quantities it was costing us much more than was reasonable under the conditions that we had made our price per square foot, and it was now ready for the concrete and we could devote ourselves to the concrete work, go ahead with it, and it was agreed between us that would not *sent* any more.

Mr. Wait: I object and I move that that be stricken out as to what was agreed.

A. I said that we didn't want to set any more stone and Mr. Carlin said, all right.

Mr. Wait:

Q. What was that date, please?

A. I don't recall without refreshing my memory. I should say about February 1st or 2d.

Mr. Paine: That is all that I shall call on this witness for at this time, your Honor.

A Juror: Your Honor, can I ask the witness one question?

The Court: Yes, sir.

A Juror:

Q. Did I understand that the salary paid to Mr. Guerini was approximately $75.00 per week?

A. $72.00 per week.

Q. Is that a reasonable amount? That is about $12.00 a

128 day.

A. I think it is a usual and normal price. We thought at the time that it was a normal amount to allow him to live down here

and maintain his family in the States, forty dollars a week here and thirty dollars a week for his family.

Mr. Paine:

Q. In what line did Mr. Guerini's ability lie?

A. His line of work was in moulding and making moulds and in preparing mixtures of concrete for pouring in those moulds. He was artistic and he with his own hands would be able to make completely the eagle from start to finish. He was not just a man who could stand by and direct and tell somebody else what to do but he actually did the work with his own hands. That was the type of man. We looked him up. He had done very satisfactory work on the West Point buildings for the government and we found this out before we went in with him when we took the contract.

Mr. Wait: I would like the plaintiff to finish with this witness so that I can complete my cross-examination.

Mr. Paine: As far as I can see now, there is nothing more to ask unless there is something that has to be supplied. As far as I can see now I am through with him.

The Court: This finishes with the examination of the witness, as I understand.

Mr. Paine: Unless I have forgotten something.

The Court: If there is anything else, it will come up by special arrangement.

Mr. Paine: Yes, sir; I will apply to your Honor and state what I want to bring out.

Cross-examination.

By Mr. Wait:

Q. Mr. Converse, Mr. Guerini differed from Mr. Follett in that one respect that Mr. Guerini did things and Mr. Follett looked on, didn't he?

A. No, sir.

Q. What did Mr. Follett do down here?

A. Mr. Follett was agent and in charge of the work.

Q. What did he do?

A. That is what he did.

Q. What?

A. He was in charge of the work.

129 Mr. Wait: Now I move that that be stricken out. That is twice volunteered that he was in charge. I didn't ask him that.

A. That is what he did. He took charge of the work.

Mr. Wait: I ask again that it be stricken out. That is the third time.

The Court: The request to strike out is denied.

Mr. Wait: Note an exception.

Q. What did Mr. Follett do that you know of?
A. Do where?
Q. Here in San Juan.
A. On this job? That was not your first question, what did he do. What did he do here on this job? He was here and took charge of the job for the Guerini Stone Company.
Q. Is that the best answer you can make as to what he did?
A. It is my answer. I don't know what else you want. If there is anything else I can develop out of that.
Q. Is there anything mysterious about the question to ask you what Mr. Follett did?
A. It is a very peculiar question. I can't follow his acts all day long. It is five years ago.
Q. You don't know and can't tell what he did, can you?
A. He took charge of the federal building for the Guerini Stone Company.
Q. And that is all you know about it?
A. I know that.
Q. Is that all?
A. Well I received his reports from time to time while I was in Boston. He made reports. He directed how the work should be done.
Q. Do you know that? Did you ever hear him?
A. Yes.
Q. Did he know how to mould?
A. Yes.
Q. Did he know how to mix concrete in this manner that was required for this building?
A. Yes.
Q. Where had he learned it?
A. I don't know where he learned.
Q. Had he ever made a block of artificial stone except ordinary concrete before he came down here?
A. We don't distinguish between.
Q. You don't want to answer my questions do you?
A. I do.
130 Q. Then will you kindly answer it?
A. What is the question?
Q. Did you ever know of his making any artificial stone except common ordinary concrete?
A. I don't know.
Q. Did he ever make any artificial granite to your knowledge?
A. Probably not, no.
Q. Did he ever make any artificial sandstone to your knowledge?
A. Yes, in Boston.
Q. Before he came down here?
A. I don't know.
Q. Did he ever make any terrazzo that you know of?
A. I don't know.
Q. At the time that you sent him down here then, he had no ex-

perience whatever in the class of work that was to be done for this building except the ordinary concrete, did he?

A. He had experience in the class of work that was to be done here and understood it perfectly.

Q. In artificial stone?

A. In the work for this building.

Q. Can't you answer my question? The artificial stone.

A. What do you mean by artificial stone?

Q. I mean this artificial sandstone here on the front?

A. Yes.

Q. Where had he had that experience?

A. In and around Boston; it is no different.

Q. What buildings? Answer me.

A. I don't recall.

Q. Name a building in Boston anywhere that has got that artificial sandstone on it, or had at that time?

A. There is absolutely no difference between that stone and any other kind of stone.

Q. Will you kindly answer my question and will you name a building in Boston, which in February, 1911, had artificial sandstone on it?

A. In Boston, I don't recall.

Q. Anywhere else that Mr. Follett had charge of or did it.

A. I should have to refresh my memory and look over what jobs we did.

Q. There weren't any; don't you know that, that he was in charge of?

A. No, I don't recall. We don't consider there is any difference.

Q. I don't ask you that.

131 Mr. Wait: I ask the Court to instruct the witness to answer the questions.

Q. Was there any building that you know of that Mr. Follett ever had any experience on, in artificial sandstone or artificial granite or artificial imitations of any stone except common concrete?

A. I will refresh my memory and answer it later. I don't recall at the present time.

Q. You didn't pay the men down here in San Juan, did you?

Mr. Paine: There is no testimony as to the payment of men in San Juan. I am going to put that in by Mr. Follett.

Mr. Wait: Why don't you let him answer if he can answer any question.

The Court: Answer the question.

A. I should have to refresh my recollection. It is possible the first week while I was down here I paid the men. I drew the checks for the money, but the payment of the men down here was by Mr. Follett who was here during the progress of the work. The payrolls didn't go to me, until after they had been paid.

Q. When you were down here and you saw Mr. Guerini did you

know that he was doing work on other structures or buildings around about San Juan?

A. I know that, when I was here the first. The first weeks, that he was not doing work on other buildings.

Q. Will you answer my question? Did you know that Mr. Guerini did work in San Juan on other buildings than this building in which we sit?

A. I did know it.

Q. Did you know that he worked on the Colonial Bank?

A. I know that he made certain imitation stone work and proper credit has been given the Carlin Company for that. That is all set forth in our account. I do not know that he did work for Mr. Stierle.

Q. Did you know that he decorated and made monuments and tombstone for people here, while this building was in operation and construction, and while he was down here?

A. That may have been after we were through with him.

132 I ask you to state specifically when. I did not know that he was doing monumental work here for people at the cemetery. I did not know that he practiced architecture and made plans for buildings while this building was going on, and while the Guerini Stone Company were down here doing this work.

I don't recall that in the shops that we built to do this work, that he did moulding and did designing for other structures and other work in San Juan. I don't recall that he did work for one Ciro. The amounts that we know of any work that was done while we were here, have been credited to the Carlin Company. The amount of cash received on account of it credited to the Carlin account.

Q. In this case have you given any credit for that?

A. I think it amounts to $710.00.

Q. Is it in the pleadings here, the $730.00; is it credited in the pleadings?

A. I don't know.

Mr. Wait: What page, Mr. Paine?

Mr. Paine: Page 10, of the record.

Q. Did Mr. Follett have any other interests than merely this building for you down here?

A. He would keep his eyes open for the interests of the company. I think he made estimates down here for the Guerini Stone Company or for me while he was here.

Q. Did he visit different parts of the Island and look up contract work for you or for the Guerini Stone Company?

A. He may have done so on one occasion, not on numerous occasions.

Q. Did he go to the other Islands, Cuba and Santo Domingo, in your interest during this time?

A. No.

Q. Now, Mr. Converse, don't you know that this $710 which you have credited here was work that Mr. Guerini did for Carlin outside and for which Guerini was paid by Carlin himself?

A. No.

Q. Didn't you know that?

A. No, it is not so.

Q. Did you think it was on account of this monumental work and these houses and the Colonial Bank that this $710.00 was credited?

A. No, I thought it was on account of statements which we rendered and put in proper business form. One item I re-
133 member was for Mr. Hatch. I think that was the Colonial Bank building. The transaction was all properly credited and the parties notified; which is part of the $710.00. I think that was 300 odd dollars.

Q. Did you know how Mr. Guerini departed from the West Point buildings that you mentioned?

A. I don't know how he departed; he may have walked or he may have gone up in a flying machine. I did not know that he had some trouble up there and that he was fired.

Q. Did you ever hear anything about it?

A. I understood that the Department at Washington was pleased at his artistic temperament and method of handling ornamental pieces of concrete.

Q. But as to his business methods that he was better away from there?

A. At that time, I didn't know him at all. I had more experience afterwards down here with him.

Q. And you had to get rid of him, didn't you, and dismiss him?

A. Yes, sir.

Q. And he was not here until the work was finished, was he, that is, not on a salary or on the payroll?

A. You mean he was not here? Your question will have to be more exact.

Q. When he came back on February 17th, he didn't come back here on your payroll, did he?

A. I should have to refresh my recollection from the payroll; I don't think so.

Q. At that time when he came back here in the early spring of 1912, you had dismissed him, hadn't you?

A. About that date.

Q. Now to come right down to the fact, Mr. Converse, and without casting any reflections upon anybody, the fact of it was that Mr. Guerini was addicted to liquor, wasn't he?

A. I don't know.

Q. You don't know that?

A. No, sir, I never saw him drunk.

Q. Did you know anything about the time that you discharged him, that he was addicted to liquor?

A. No, sir; I never heard that brought up. I remember when I ordered him to Boston in December, 1911 or January, 1912.

Q. Had some trouble here with the government authorities,
134 didn't he?

A. No, I received a letter from the Carlins complaining

that he was doing a lot of talking around and that I must caution him to be more careful, which I did in a letter.

Q. And that letter recalled him, didn't it?

A. No, it did not. The friction seemed to continue and I thought that it was best to placate or show as much desire as possible to do everything that I could to please the Carlins in the matter and remove anything that was a friction or an obstacle in the completion of the job, so finally after a number of letters back and forth, I cabled Guerini to come to Boston.

Q. He was of an irritable disposition, wasn't he?

A. I never had enough experience with the man; I don't know him well enough to know whether he was irritable or not. On occasion he might be. I know on one occasion I wrote to the Carlins that it was a hot country down here and he was a new man and it might be possible that he was irritable and they had better be as lenient with him as they could in that particular.

Q. Do you remember the time that you telegraphed that he was making threats to go to Washington and expose Captain Stierle and do other terrible things?

A. I didn't know about that.

Q. Do you remember when he got to Boston that he told you that he was going to Washington and he was going to expose the whole thing and he was going to tell the Supervising Architect and others what the situation was here?

A. I didn't happen to be in Boston, I happened to be on my way down so I didn't see him, so your question is answered. He returned to Porto Rico without seeing me.

Q. Do you remember writing to the defendant a letter in which you say: Mr. Guerini is an Italian and has a very excitable nature?

A. I do; the letter may be put in evidence.

Q. And do you remember of saying that it was too bad if he was doing loose and indiscriminate talking?

A. I do. I should like to see the letter.

Q. I am reading it. I want to test your recollection. And do you remember that you told Mr. Carlin that you wrote him that he should not go to Washington and tell anything?

A. No, sir.

135 Q. You don't remember that?

A. No, sir.

Q. You remember that he did go to Washington, don't you?

A. At what time?

Q. When he was up between December or January and February 17th.

A. It is difficult for me to fix the dates. He did go to Washington. I don't recall. That is a matter of record and my memory could be refreshed by data on the subject.

Q. Don't you know, and know as a matter of fact that this investigation of the foundations of this building was precipitated by Mr. Guerini's visit to Washington?

A. I do not.

Q. Didn't you know that at the time?

A. I did not.

Q. I show you a letter dated December 6, 1911, from H. P. Converse to the defendant, and ask you if you remember that letter?

A. I do, I sent that to the Carlins.

Q. Did you know what the contents of it were at the time?

A. I did. It *has* nothing more than the general statement that he was causing trouble.

The letter in question was marked: 3 for the defendant for identification.

Q. Did Mr. Guerini ever tell you that the work being done here was rotten and that it was not fit for a government buiiding?

Mr. Paine: I object to that as not proper cross-examination and incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Mr. Paine: Note an exception.

A. I don't recall any such statement.

Q. Don't recall that he complained about the work and that he went to Mr. Stierle and couldn't get any satisfaction?

A. I don't remember that he went to Mr. Stierle and couldn't get any satisfaction. He complained about the work.

Q. He complained about the foundations, didn't he?

A. Yes.

Q. He complained that the foundations would not carry the building and that they would crack and settle, didn't he?

A. I don't recall any detail sufficient to say that. He complained in a general way.

136 Q. Are you really trying to remember what he said?

A. I am.

Q. Don't you remember this whole controversy between Mr. Stierle on the one side, a three cornered controversy between Captain Stierle and Guerini and the defendants here, and that you were advised of the whole matter by letters?

A. I remember of the situation and if my memory were refreshed by the letters at that time I could probably testify just what it was, but I don't recall just at this time, four or five years later, all the details.

Q. And you don't remember that Mr. Guerini went to the Governor of this island and told him about the situation of this building?

A. I don't remember it, no.

Q. Don't you remember that he went to the treasury agent here, Mr. Richardson, and told him about it?

A. I was in Boston at the time.

Q. But didn't you know about these things?

A. The letters show and I would like to have my memory refreshed.

Q. Don't you remember about these circumstances?

A. I do remember the general situation but I don't remember the details about which you ask me to testify positively.

Q. I didn't ask you for the details.

A. I don't know that he went to the Governor and you asked me if he went to Mr. Richardson, and I don't recall. I do recall that there was a good deal of discussion and we received letters from Mr. Carlin in regard to the matter.

Q. And it was on account of this situation that you cabled to Mr. Guerini to come to Boston, wasn't it, on account of this atmosphere and this situation?

A. It was. He came to Boston on several occasions though. The last time was when we were to get rid of him.

Q. Did you cable him to come to Boston?

A. I did.

Q. And did you immediately start for Porto Rico when he started for Boston?

A. No, not at all.

Q. How did it happen that you say you didn't see him?

A. This time when we cabled him to come to Boston was his last trip. I should like to fix the date there. It was some time the latter part of February and I cabled him to come to Boston and I
137 was starting for Porto Rico and I wanted him to remain over until I got back.

Q. And that was the last time he came here in your employ?

A. I don't recall; I should have to refresh my recollection.

Q. Didn't you say that was the last time?

A. To Boston on my cable, yes.

Q. Did you cable him more than once?

A. I think I did, or wrote him.

Q. I show you a letter dated, December 18, 1911, from the Guerini Stone Company to the defendant; do you remember that letter?

A. I do. This is entirely prior to the subject which I had in mind, however, at which time I cabled him to come to Boston and I was in Porto Rico.

Q. Didn't you know on December 18th, and prior to December 18th that this condition existed?

A. I did, and he came to Boston on a cable from me on December 18th. I called him up there for the purpose of discussing this matter. This was the time that I talked with him on his arrival.

Q. And wasn't this the time that he went to Washington about these matters and you told him not to go?

A. I don't recall that he went to Washington at all; he may have.

Q. Don't you remember his saying that he was going to Washington to report these matters and your telling him not to go?

A. I do not recall.

Q. Do you recall writing to the Carlins such a thing as that?

A. I don't recall.

Q. If it had not been true, you certainly would not have written such a matter to the Carlins, would you?

A. No.

The letter dated, December 18th, which was identified by the witness, is marked: 4 for the defendant for identification.

Q. I show you a letter of September 23, 1911, signed H. P. Converse, President. I don't think it worth while for you to read it, Mr. Converse. I just want to know if it is your signature?

A. If it is going in evidence I would like to read it. That is my signature.

The letter in question was then marked: 5 for the defendant for identification.

138 Q. Now, Mr. Converse, I understood you to say that Mr. Guerini did go to Washington on one of these occasions either in December or January or early February when he was there; you remember that, don't you?

A. I think he made one trip to Washington; I am not sure but he made two or three.

Q. Now, Mr. Converse, you have repeatedly said that Mr. Follett went to San Juan to take charge of or to be in charge of this work. Did you ever give any notice to the defendants that he was here to take charge of this work?

A. As agent and in charge of the work, yes. When I landed here I told Mr. Fred Carlin and Mr. Sullivan at the time that Mr. Follett would be here in charge to represent us and anything that they wanted to take up with us, to take it up with him and not with Mr. Guerini. I remember that distinctly.

Q. Why, on November 22, 1911, then did you feel required to tell the Carlin Company and to even write them a letter that Mr. Follett thereafter would handle things in Porto Rico?

A. It was probably due to some letter or something of that kind written by the Carlins; I don't recall without having the whole correspondence before me.

Q. Will you say that prior to November 22, 1911, Mr. Follett had any duties down here except writing letters, keeping the books and paying the money?

A. I do.

Q. I show you a letter of November 22d and ask if you recall that letter. Do you recall that letter, that you sent it?

A. I dictated this letter and it is in response to a letter from the Carlin Company on some occasion.

Q. Have you got that letter from the Carlin Company?

A. I don't know.

Mr. Wait: I will ask the production of the letter which this is an answer to.

The letter identified by the witness is marked 6 for the defendant for identification.

A. I say it is a letter on some point brought up by the Carlin Company.

Mr. Paine: Have you got all the correspondence here, Mr. Converse?

A. I think we have.

Q. I mean here in the court room.

A. No.

139 Mr. Wait:

Q. Mr. Converse, when you took this work which Mr. Guerini had and brought to you, as you testified, did you read the specifications, or first, did you read your contract, the contract that Guerini had?

A. I did read it clear through.

Q. Did you have the government specifications, too, by which the work was to be done?

A. I don't recall; I think we did. I would not take a job and go in partnership with a man to do a piece of work of this magnitude and not know what I was going to do and the character of it and the description of it. There is no doubt that we had the specifications, at the time Mr. Guerini brought me the contract. We had the government drawings and specifications relating to the concrete in this building. I do not remember the date when we received those drawings.

Q. How long after Guerini got this job from the defendants was it before he came to you?

A. He came to us about the first of January; I don't know how long after he got it.

Q. Don't you know when he came to you whether he brought the drawings and specifications with him?

A. I don't recall; he may have. I think he was doing business then, under the name of the Guerini Stone Company. I did not go in with him as sort of a co-partnership at first. I didn't go into this work or start in it with him until after our company was incorporated.

Q. Then the first interest that you had in this contract or in Mr. Guerini was when the company was incorporated?

A. I should not say so. We went through the preliminary matters of examining the contract.

Q. I said the first interest that you had in the matter. By that I mean pecuniary interest or rightfulness?

A. I can't determine. That is too much for me.

Q. Don't you know whether you had made an agreement with Mr. Guerini to take a share or interest in this contract before the company was incorporated?

A. I recollect that we incorporated the new company to handle this, holding everything in our own hands so that we could handle it, a Massachusetts corporation.

Q. You don't *you* know whether you had made your agree-

140 ment with Guerini to back it before that?

A. Preliminary talks were all.

Q. Did you ever have a written agreement with him as to what you would do?

A. That may have been reduced to writing; I don't recall; probably it was, the preliminary ideas of what the interest would be

Q. The fact of it was you were the financial backer of Mr. Guerini in this operation, weren't you?

A. We were an experienced contracting firm and I presume the only element in the combination that could have carried the job through.

Q. Is that an answer to my question, do you think?

A. I should say so.

Q. You furnished the money for this job and this work didn't you, the cash?

A. We did, H. P. Converse & Company did. The Guerini Stone Company had no capital and no money; didn't even have any plant.

Q. Didn't even have moulder's tools, Mr. Guerini didn't, did he?

A. That I don't know.

Q. You have got them charged in your bill. He didn't even have a hand saw.

A. He may have had them. At any rate H. P. Converse & Company furnished everything.

Q. Do you know Mr. Guerini's signature?

A. I don't know whether I do or not.

Q. Can you identify that as his signature (handing a paper to the witness)? I see you are reading it; I simply asked you to identify the signature.

A. If I could have the original contract I might identify it. I can't identify his signature.

Q. It is beyond you, is it?

A. Well, I am not an expert in handwriting.

Q. When you read this Guerini contract do you remember reading this: The sub-contractor shall and will well and sufficiently perform and finish in a thoroughly workmanlike manner under the direction and to the satisfaction of the general contractors and James Knox Taylor, architects, or his or its representatives, to furnish and set in position, including the concrete backing, all the imitation of sand stone, and to construct the interior concrete walls, etc., for the San Juan Postoffice, in the City of San Juan, agreeable to the
141 drawings and specifications made by the architect; do you remember that?

A. I should like to read it to refresh my recollection.

Q. What I want to call to your attention is, did you think that you had to do this work under the direction and to the satisfaction of the defendants, the general contractors?

A. From my knowledge of the business I knew that he could not burden us with anything that is unreasonable.

Q. Do you think that is an answer?

Mr. Paine: I object to the question as calling for the opinion of the witness.

Q. I asked him if he knew that he had to do this work under the direction and to the satisfaction of the general contractors.

A. I don't think I did. The general contractor might have gone

crazy and I don't think I would have had to do the work to his satisfaction then.

Q. You don't think you know. I call your attention to it right there, (handing the contract, Exhibit 1 for the plaintiff, to the witness). It says so, doesn't it?

Mr. Paine: I object to calling on a lay witness to give an opinion of a contract.

A. As Mr. Carlin wrote us, the contract speaks for itself. I read the contract.

Q. And this is the contract, isn't it?

A. It looks like it.

Q. Any doubt about it?

A. I haven't any opinion.

Q. You knew that you couldn't get any money under this contract until the work had been done to the satisfaction of the general contractors, didn't you, from its terms?

Mr. Paine: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination and calling for a conclusion of the witness as to the meaning of a written contract.

The Court: The objection is sustained. If that is in the contract, it speaks for itself.

Mr. Wait: Note an exception.

Q. Do you know the dates on which you were in San Juan?

A. Approximately.

Q. When were they?

142 A. I left New York on the 18th of February, 1911, and arrived here about the 23d of February, 1911, and I was here for about four or five weeks. I think the whole trip took about six weeks. That would bring me around the early part of April, returning to the States.

Q. Did you spend all of that time in San Juan.

A. Not all of that time. I was away on several successive days. I was here later on in the job in charge of setting up the steel work while Mr. Oaksmith and Mr. Carlin went over to the other side of the Island, but I think that was a later trip.

Q. That was three days, wasn't it?

A. I don't recall.

Q. Don't you remember whether it was three days or three weeks?

A. I don't recall; I think that I took charge of their steel erection during one day. And I did at their request and as an act of kindness and for which they thanked me. I think my next trip was in May. I don't recall exactly. I should have said that it was in the latter part of May. Then the third trip was the next year, 1912, along in February. That was the time that I missed Guerini who was going back and I was coming down.

Q. Now, did you have any conversation with Guerini as to how this artificial stone was to be made and set at the time that he came to you and asked you to go in with him on this contract?

A. Not that I recall.

Q. You knew as a matter of fact that Mr. Guerini expected to cast this artificial stone in blocks and set it with a derrick, didn't you?

Mr. Paine: I object to that as incompetent, immaterial and irrelevant and not proper cross-examination and there is nothing of that in the direct-examination and it calls for a conclusion of the witness and the construction of the contract.

The Court: The objection is sustained. I don't remember anything analogous to that in the direct.

Mr. Wait: Note an exception.

Q. Did you study that at the time together with Mr. Guerini and talk over with him the manner and method of doing this work before you took a share in it or came in with him?

A. Did I study over the manner and method of doing the work before I went into the contract with Mr. Guerini?

143 Q. Yes.

A. No, sir; we felt competent to estimate and carry the job on ourselves if we were going into it.

Q. Did you assist Mr. Guerini in preparing three drawings showing the jointing of the blocks of artificial stone?

A. We did not; a draftsman in my office assisted him.

Q. Do you remember that he prepared three drawings, numbered one, two and three, showing the jointing of the concrete blocks, and that they were sent to Washington or to Mr. Carlin?

A. I recall that there were such drawings made by Guerini. That was just prior to his coming down here in January and the early part of February.

Q. Do you remember having received letters from the government to the effect that that was not their idea of casting these stones in blocks and setting them in the wall?

A. I recall that the government did make objections and finally upon our calling attention to the fact that each day's pouring would show a color line or a joint, we were ordered by Mr. Carlin to take up the matter and settle it with Mr. Stierle down here, I think. We never came to that work, however.

Q. That is not what I referred to. I referred to the drawings which Mr. Guerini prepared at the beginning, numbered one, two and three, and which he sent to Mr. Carlin and which Mr. Carlin sent to Washington to the Supervising Architect and the Supervising Architect answered that that was not his idea; he said that you had misconceived his idea; that it was not his idea to cast this stone in blocks and then set it, but that it was to be poured in the monolithic style, and that his letter was sent to you at Boston.

A. I should like to have my memory refreshed with the letter, but I don't doubt that it was sent if you say that it was sent.

Q. I show you a letter in this copy book, page 506, dated February 28, 1911. Do you recall that letter?

A. Yes, sir; that expresses exactly the idea of doing the work all right.

Q. And that corrected the impression that we had, all of us, that this stone was to be cast in blocks.

A. That who had?

Q. Well, that Mr. Guerini had and Mr. Carlin had, and that the stone was not to be cast in blocks and set like granite but that it was to be cast monolithic?

144 A. I don't know what impressions the others had, but from the drawings that Mr. Guerini produced, it was undoubtedly his impression.

Q. And this was a rejection of those drawings and the statement that that was not the idea of the Supervising Architect, was it not?

A. Yes, sir.

Q. And the letter was sent to you on February 28th giving you notice of that, wasn't it?

A. Yes, sir, but prior to this time Mr. Guerini had departed for Porto Rico.

The letter in question is marked 7 for the defendant for identification.

Q. Now, Mr. Converse, you had not done any artificial stone work prior to your going in with Guerini, had you; by that I mean artificial sandstone or artificial granite.

A. Yes, we had not made artificial granite. In our opinion we had made artificial sandstone. I don't know whether we would in your opinion or not.

Q. Where, and on what building had you used artificial sandstone of the character or anything like the character in this building?

A. Wherever we put concrete into forms of a similar mixture to this and spaded back and kept the stone from the surface so that the surface left exposed only sand and cement, that would be an imitation sandstone and the smoothness of that exterior had nothing to do with it.

Q. Do you think the answer "Wherever we do this" is an answer to my question?

A. I think so; we did numerous large jobs.

Q. What buildings did you do that had a sandstone front with a sandstone finish?

A. The buildings in which we had artificial sandstone, it may not have been the whole front, but in which it had the same effect, that of the Malleable Iron Fittings Company of Branford, Conn.

Q. What was the face of that; what kind of stone?

A. Simply concrete with the stone kept back from the face and then a rubbed surface to make it smooth, and the surface was composed of sand and cement.

Q. Just like a sidewalk, wasn't it?

A. No, a sidewalk generally had some stone in the surface.

Q. Aren't the stones in a sidewalk generally pounded down

145 from the surface?

A. Generally you will find a more durable sidewalk has the stone upon the surface. The stone makes a harder surface, and therefore if you have stone in the surface, it is better, just as this

terrazzo has a larger amount of stone in the surface. That is better than to crowd all that stone back and leave just the sand and cement, but some architects prefer to have for the effect on an exterior, just sand and cement.

Q. Do you think that is an answer to my question?

A. I understand so.

Q. Is stone work like this ornamental sandstone in front any more expensive than concrete such as you put in foundations and in the walls between the beams?

A. The ornamental sand stone?

Q. Is this work of sandstone finish on the front here any more expensive than the work in the foundations and in the walls of this building and in the floor reinforcement?

A. Your question will have to be more explicit. The exterior plain surface of these walls would be no more expensive than a thin slab on the floor. The blocks which were ornamental, I understand were to have an added cost of the plaster moulds, for which we took an extra price, but the concrete put into a building, anybody that has done any concrete work in a building knows that there is nothing special or mysterious or difficult about the concrete for these exterior walls. The stones are kept back from the surface.

Q. And nothing more expensive about it?

A. About what?

Q. About the concrete constituting this face of the ornamental sandstone, it is not more expensive than the ordinary concrete put in the walls and floors.

A. You will have to be more explicit.

Q. Is it any more expensive, I asked?

A. You will have to be more explicit. It wouldn't be any more expensive whether you have a six-inch slab on a floor or a twelve-inch wall in the basement or an interior wall; the concrete would be more expensive.

Q. And then these walls of this room which I assume are made of concrete, the concrete where it is faced on both sides is just
146 as expensive as on the front of the building with the sandstone finish, is it?

A. Yes, if it is finished. This is of course painted I presume or tinted; I don't know what work has been done here. You have got to take all the conditions of just what work you are going to do to know what the cost is.

Q. I am speaking of the concrete, not any finish or decoration afterwards?

A. What do you want to know about the concrete?

Q. Whether the concrete in the wall on the front is not more expensive than in the walls in the interior, with the sandstone finish on it.

A. Not if you take all the elements of your walls; if your walls are to be finished smooth.

Q. And the concrete in the basement and on the retaining wall under the loggia here is just as expensive, is it?

A. It would depend on whether it was poured in forms. I can't say without an examination.

Q. You don't know whether it was poured in forms, do you?

A. Don't know whether what was poured in forms?

Q. The concrete in the basement, in the retaining walls and in the piers?

A. That question embodies very many things. Certain of the concrete was not poured in forms in the basement and some of it was. You spoke of the piers. Those were poured and rubbed.

Q. They were poured in forms?

A. They were poured in forms.

Q. Was any concrete put in this building above the basement floor that was not poured in forms?

A. I don't recall.

Q. Mr. Converse, were you here when any of the artificial stone except the concrete below the first floor was made or set or placed?

A. I was not here when that was done.

Q. Did you ever see any of the artificial stone made in this building?

A. Yes.

Q. Now you mean ordinary concrete, don't you?

A. No, I mean the artificial stone, the ordinary concrete stone; I don't make any distinction.

Q. When were you here last?

A. I think it was February, 1912.

147 Q. Don't you know that not a particle of the artificial stone had been made or placed in this building at that time?

A. Certain piers were made which were finished smooth, just as the plain surface was finished on the outside.

Q. Is that what you call artificial stone?

A. If you confine yourself to the artificial stone made in the moulds, there was none of that made.

Q. Will you answer my question? Do you call the piers downstairs artificial stone in the sense as applied to this building?

A. No, I think not. It ought to be a little more clearly stated.

Q. Did you ever see one single square foot of artificial stone made and placed in this building, meaning artificial stone that Mr. Guerini was specially employed down here to make, and not ordinary concrete?

A. No, we don't distinguish in the concrete, except between that which is moulded in forms in the shop and then brought into position, which is the ornamental stuff and the pilasters.

Q. And, Mr. Converse, you don't and you won't distinguish between this beautiful sandstone front and the ordinary piers down in the basement, will you?

A. Distinguish in what particular.

Q. As to the cost or as to the skill in making?

A. No.

Q. And you don't distinguish it?

A. The cost of making is the same.

Q. And you don't distinguish it in the vernacular of engineer-

ing construction or building construction; it is all the same thing to you, is it?

A. Piers in the basement are not the same thing as the front work.

Q. Are you purposely taking the time of the Court to dodge these questions by stating to the Court that the piers in the basement are not the same as the front of the building?

A. No, sir.

Q. I spoke of the cost and character of the work of the stone and material itself on the piers and side walls of the basement as compared with this beautiful sandstone front; do you distinguish them at all in speaking of them in engineering or building practice?

A. The piers and side walls of the basement are of a different class.

148 Q. What is the different class now of the piers and the sidewalls in the basement?

A. Your pier might be finished on four sides and the wall might be finished only on two sides, the interior walls, for instance.

Q. Is that what you distinguish now with respect to the class of work, the class of concrete in the sub-basement?

A. There is only a difference in the finish if you are speaking of one section as compared with another.

Q. And that difference is that the piers are finished on four sides and the walls on two sides, and do you think that is an answer to my question?

A. Yes.

Q. Taking up your estimate of this work, when did you make that estimate first?

A. When did I make my original estimate?

Q. When did you make the estimate that you have given to this jury?

A. Well, I made that particular one within the last two or three days; yesterday I guess it was.

Q. You didn't make the estimate of the cost of this work which was submitted to the Carlin Construction Company originally, did you?

A. The original, no. Mr. Guerini made the original.

Q. And it was made and the contract given to him before you had any connection with Mr. Guerini, wasn't it?

A. Yes, sir.

Q. Was this estimate which you gave here, the estimate which you made when you determined to go into the job with Mr. Guerini?

A. It is and it is not; the quantities were made at that time and the unit figures were the same as used at that time, but as confirmed by the prices which we paid here.

Q. And in every instance of all the materials that you used here, the prices were just exactly what you had anticipated and figured they would be, were they?

A. They were not greater.

Q. They were not greater; were they the same?

A. In many cases.

Q. Were they in all cases?

A. That I don't recall.

Q. Now I asked you if you did not figure your cement in this estimate at $1.83 per barrel?

A. I did and $2.75 per cubic yard.

149 Q. How much did you figure for your sand?

A. $0.90 per half yard. That is what I used for a yard of concrete.

Q. How much did you use for your crushed stone?

A. Crushed stone and water $2.20 per cubic yard, that makes $5.85.

Q. I ask you if you figured your lumber at $30 per thousand?

A. I did.

Q. How much will it take to cover this wall on one side if it cost $30 per thousand if your lumber be one inch or seven-eighths?

A. One inch would be one square foot, that would be three cents. If it is covered on two sides of the wall, that would be six cents. I do remember that I told the jury that we used our lumber over again, from three to five times, and that I figured then that I used it three times.

Q. If it costs six cents for lumber to cover the wall on each side and you used it three times, how much would that be for one using?

A. Two cents.

Q. Didn't you say that it was one cent?

A. I said that the one cent was for the labor when it was taken down and taken over and set up the second time, that is, for the second and third usages where you don't have to buy the material and make it up.

Q. Now then your mixing and placing your runways cost you $2.50 additional?

A. Yes, sir; that is our estimate.

Q. Is that based on what it cost you here?

A. Yes, sir; that is based on a fair cost.

Q. Did you keep any account at all of your horses and runways here?

A. We from time to time checked it up.

Q. Did you do it yourself?

A. Yes, from reports that I received.

Q. Oh, you did it from reports that you received?

A. Yes.

Q. From whom did you receive the reports?

A. From the job, from Mr. Follett. I figured our forms at $5.40 and I figured our concrete materials at $5.85, and our forms cost almost as much as the materials according to my estimate.

Q. Is that usual?

A. It depends on the job entirely.

Q. Do you say that that is usual in the work that you have been doing?

A. In work of the same or similar character. I have done

150 work of the same or similar character. The $5.85 and $5.40 gave me $11.25 and adding in $2.50 makes $13.75. Then

I added $2.00 for overhead charges. We did keep account of the overhead charges on this job. They were the bills that were presented. I don't recall how much they were. I figured out the overhead charges in the neighborhood of $6,500. I think. That was approximately for what we call overhead. That $6,500.00 was the amount of our overhead charges while you were down here doing that work. As I explained my estimate to the jury, that that included Mr. Guerini's and Mr. Follett's salaries and expenses, and my own, whatever travelling expenses were necessary, and freight on the machinery.

Q. And did you figure out and find what per cent that $6,500.00 made of the total amount of money you expended down here?

A. We figured it was two dollars a yard; yes, sir. I don't think we did figure the per cent.

Q. If this $6,500.00 was the amount of your overhead charges and that was two dollars a cubic yard, that would mean that you placed over 3,000 cubic yards, wouldn't it?

A. Yes.

Q. Did you place 3,000 cubic yards of concrete here?

A. No, we had our overhead expense just the same.

Q. Then two dollars a cubic yard of overhead expense was not derived from what you actually spent on the job, was it?

A. Yes.

Q. As overhead charges?

A. Yes.

Q. For concrete work?

A. During the concrete work on this job, yes.

Q. And you charged it all to the concrete at two dollars per yard did you?

A. Yes, the whole $6,500.00. We didn't charge any overhead or general expenses to the setting of the granite because we didn't know what we were to do.

Q. I don't ask you the cause or because; what was this $3 for the 182 tons of stone to be cast?

A. That was the cost of setting this stone, which is cast in the shed and then brought to the building and set. That is the setting charge for this ornamental stone work on the job. This
151 $523.00 was for the plaster moulds, the additional, what we considered the additional amount for the plaster moulds. Certain of these moulds are made in boxes in the shop and then lined with plaster, and, the plaster mould made with shellac.

Q. Is $523.00 the actual amount that you spent for that?

A. I should say it was about that, yes, approximately. That was not a third of Guerini's wages.

Q. Was the $546.00 the actual cost to you to set this moulded work?

A. We did not set any of it. That was our estimate of what it would have cost.

Q. It is a mere guess, isn't it?

A. No, sir; it is the result of my experience in that class of work.

Q. Where did you ever set any decorative work moulded and modeled?

A. We have set a large amount of stone.

Q. Where did you set any decorative work like this eagle and these frills and decorations on a building?

A. We have set them in Branford; we set them in North Adams.

Q. Who cast them?

A. I don't recollect.

Q. That was based upon that experience was it, this $546.00?

A. It was based on my experience since 1887 in contract work.

Q. Now coming down to this matter of applications, when did you have the conversation with Mr. Carlin or anybody in New York about these unit quantities and unit prices?

A. About the first or second of February, the first part of February. Either one or the other; the correspondence shows exactly; it was the first part of February. My estimate of the total yardage of concrete that I was to put in here was 3298. And that multiplied by $15.75 gave me $52,768, more or less.

Q. Now when you went down and had this conversation with Mr. Carlin, Mr. Carlin told you to render your estimates in the actual quantities and at certain prices did he?

A. He told me to render them the information as to the number of yards of concrete put in and the number of square feet, of granite in a separate letter, because his form did not call for these unit figures or quantities; on the blank itself I was to put the amounts. He told me to make those amounts up by using $1.07 per cubic foot for the concrete and 45½ cents per square foot of floor surface.

152 Q. Is that all he said?

A. Well, I don't recall. There were probably other words spoken.

Q. Is that all he said about that matter?

A. That is all I recall at the present time about that matter.

Q. He told you to make up your applications at $1.07 per cubic foot for the concrete work, did he?

A. Yes, sir.

Q. And that is all?

A. That is all with reference to that matter. And I did make our applications in quantities at $1.07 per cubic foot.

Q. That is not what you testified to with your counsel, is it?

A. To the best of my recollection.

Q. That is all that you remember now that was said, is it?

A. Do you mean the whole conversation?

Q. I mean the whole conversation about how you should make your applications out?

A. I think I have given that conversation once.

Q. I want you to give it now?

A. You want me to give it a second time? I went into his office and said we had expended large amounts of money down here and we must have some payments; we had been on the job over a year.

Q. Now that is not about this matter of units is it?

A. You asked me for the whole conversation.

Q. I asked you for the conversation about the units. I want to know about the quantities and the units and that is all I want to know about?

A. I don't know that I can separate it as counsel wants. I would have to give the conversation in my own words.

Q. I want it in your own words but I don't want you to tell about anything except units and prices?

A. Mr. Carlin said that we were to render our monthly applications in those units and that we would be paid on that basis.

Q. Now did he say that you would be paid on that basis?

A. Yes, sir.

Q. Are you certain?

A. As far as I recollect.

Q. Do you recollect it?

A. Yes, sir; I do.

Q. Did you expect to be paid $1.07 for the concrete?

A. I did not for the whole of it, but for the first part.

Q. This was a temporary arrangement for the first part,
153 was it?

A. Not at all; it was his suggestion. I will say that he promised and told me that we would be paid at the rate of $1.07 per cubic foot.

Q. And you expected to be paid $1.07 per cubic foot for the concrete that you put in this building, did you?

A. No.

Q. Why didn't you?

A. Because I knew that there would come a time when that would be shown to be too high a figure and it would run over our contract price.

Q. Do you know how much money that would have come to?

A. I knew at the time.

Q. You thought that he was a fool, didn't you?

A. No, I thought he had agreed to give me that because that was what he got.

Q. How much would that have given you in cash for your concrete if he had paid you at the rate of $1.07 per cubic foot; have you any idea?

A. I don't recall.

Q. For your concrete work it would have given $105,979; now do you want this jury to believe that he told you that he would pay you $1.07 per cubic foot?

A. I do, and I want them to look at the letters on the subject.

Q. That is what we want. Do you tell this jury that Mr. Carlin said that he would pay you $1.07 for your concrete when that amounts to about $107,000.00 and your contract price was $64,000.00?

A. I do.

Q. Do you remember a letter of January 27, 1912, that you wrote to the defendants in which you stated that there are about 3500 cubic yards in our job and this will give us an average price of $18.50 per cubic yard?

A. Yes, sir.

Q. And do you remember that you made application at that time for payment on the quantity that you had put in at $18.50 per yard?

A. Yes, sir.

Q. Do you know what $1.07 per cubic foot, makes per cubic yard?

A. Something over $27.00.

Q. This was under date of January 27th?

A. Yes, sir; it shows my fairness in the matter.

Q. Don't volunteer please. When you went down there February 1st or 2d and Mr. Carlin offered or promised to pay you $1.07 per cubic foot, you must have gone away feeling very much gratified, didn't you?

A. Gratified about what?

154 Q. About his promise to pay you $1.07 per cubic foot?

A. I had my doubts; I had not seen the color of his money and so I had my doubts.

Q. You didn't stop to think what it amounted to, did you?

A. Not on promises from the P. J. Carlin Company.

Q. You didn't have any confidence in the promise did you?

A. I don't know.

Q. You knew it was ridiculous, didn't you?

A. I understood he received that amount from the government.

Q. How did you understand he received that from the government?

A. I don't recall now; I simply recall the impression that I had at that time.

Q. Do you testify right along to this jury by impressions?

A. No, I stated to the jury, that I had the impression at that time that they were getting that amount from the government.

Q. Did Mr. Carlin tell you that was the amount he was getting from the government?

A. I don't recall whether he did or did not.

Q. Don't you know that he told you that that was what he was getting from the government?

A. I don't recall.

Q. Do you remember also that he told you that of course your work in the basement was not worth anything like what it would be upstairs in the floors and on the fronts?

A. No, sir.

Q. I call your attention to your letter to the defendants dated, February 6, 1912, Plaintiff's Exhibit 17, which reads as follows: "P. J. Carlin Construction Company, New York. Gentlemen: In accordance with your instructions to Mr. Converse, we have made our January requisition in the units and unit prices used by the government engineer when he makes up the monthly estimates according to your schedule of amounts." Did you write that letter?

A. Yes, sir.

Q. Then you knew at that time that this price of $1.07 was the price which the engineer used in making up Mr. Carlin's monthly estimates in his amounts, didn't you?

A. What did I say? Did I understand or I knew? I think I said I understand, therefore didn't say that I knew.

Q. Do you want me to read this again to you? "In ac-
155 cordance with your instructions to Mr. Converse, we have made our January requisition in the units and unit prices used by the government engineer when he makes up the monthly estimates according to your schedule of amounts." There isn't any I presume or I understand is there in that?

A. Then I didn't hear it right.

Q. Didn't he tell you at that time that this $1.07 was what the government was allowing him for this concrete work?

A. Possibly.

Q. Don't you know he did?

A. I don't know it.

Q. Hard work for you to admit it, isn't it?

A. No, not at all.

Q. You knew at that time on January 26, 1912, didn't you, because you said it in this letter. Do you want me to read it again to you?

A. No.

Q. I want to know if you did not know on January 26th when you wrote that letter Exhibit 17?

A. I think that whole clause is modified, "in accordance with your instructions to Mr. Converse."

Q. Read the rest.

A. The rest is, "we have made our January requisition in the units and unit prices used by the government engineer." We couldn't vouch that that was what Mr. Carlin was getting, but he had evidently told us at the time.

Q. Then you knew that those were the prices that Mr. Carlin was getting from the government?

A. He probably told us so.

Q. That is so hard for you to admit that you cannot say so without putting probabilities in it.

A. I don't know whether he told me so or not.

Q. You don't know now whether or not he told you?

A. No.

Q. Now, Mr. Converse, be honest, can't you conceive that Mr. Carlin told you that those were the government's prices to him
156 and that you went away with the impression that that was what he was going to pay you?

A. I said that some time ago.

Q. Did you tell the jury that that was your impression?

A. I think so, some time ago.

Q. Didn't you tell the jury absolutely and certainly after that, that Mr. Carlin said that he would pay you $1.07 a cubic foot?

A. I did.

Q. Isn't it possible that you were mistaken and that he told you that that was what the government was allowing and you got the wrong impression from that?

A. Not at all.

Q. Have you got any explanation of that letter and statement which I read to the jury?

A. I said in accordance with your instructions to Mr. Converse, we had rendered our requests in those units as agreed.

Q. And the prices used by the government engineer when he makes up the monthly estimate according to your schedule of amounts; is that right?

A. That is right; we received no disclaimer from him regarding it.

Q. Mr. Converse, were you afterwards told by Mr. Carlin that this allowance of $1.07 a cubic foot was due to a mistake that Mr. Stierle made and that afterwards it was rectified and only 35 cents and 50 cents allowed per foot for that work down in the basement?

A. I don't think I was told by the Carlins. I think that knowledge came to me.

Q. Mr. Berryman told you, didn't he?

A. I should say not. I met Mr. Berryman once.

Q. But you knew about it?

A. Oh, yes.

Q. Did you also know when Mr. Berryman came down, after Mr. Stierle left the work, that he held and maintained that according to the contract Mr. Carlin had been paid eight thousand and odd dollars more than he should have been paid and that that was taken out of the Carlins' estimate.

A. I understood that that was the situation.

Q. And Mr. Berryman held that this price of $1.07 was altogether too large for the work down in the basement and the floors and that it ought to be reduced to 35 cents?

A. No, I understand that Mr. Berryman said that that was in accordance with the terms of the Carlin contract with the gov-
157 ernment.

Q. Did you know that Mr. Berryman reduced the estimates so as to take that $8,000.00 away from the Carlins?

A. I understand that he did.

Q. Now, Mr. Converse, was there anything in the contract that said that you should get what Mr. Carlin got out of this contract?

A. I don't think so; the contract speaks for itself.

Q. Now you have read the opinion of the United States Supreme Court in this case, haven't you?

A. Yes, sir

Q. And you have in mind that the United States Supreme Court held that there was nothing in the contract to fix the amount of the monthly payments, haven't you?

A. Yes, sir.

Q. And you have in mind also that if you are going to base this breach of the contract upon the failure to pay money, that you have to establish in some way that there was a promise on the part of the Carlins to pay you some definite amount per month, haven't you?

A. Yes, sir.

Q. Otherwise you cannot premise any breach on the failure to make monthly payments, can you?

Mr. Paine: I object to the question as improper and immaterial.
A Juror: May I ask a question?

A Juror:

Q. Isn't there some clause in the contract that provides for making payments?

A. It does; it provides that we were to get 85% monthly and we understood that we were to get our money every month and we didn't get it and we were sore.

Q. Could you tell us the percentage of the sub-contract that was finished at the time that the contract was broken off?

A. I know approximately what it was but I don't know exactly. I think Mr. Follett could give the quantities We give the quantities in our monthly applications.

Mr. Wait: If you know, I consent that you should state what per cent. had been finished.

A. To the best of my recollection, it is something around 25%, something of that kind in quantities.

Q. The applications on their blank forms and the only ones that you made to the defendants for payment were based upon
158 $1.07 per cubic foot for concrete after February 1st or 2d, were they not?

A. That is my recollection, all of them. Before our conversation or when we used these blank forms, we had made one or two applications in a lump sum.

Q. Without any regard to the quantities or to any unit prices?

A. With regard to the form on which the application was made, in which that form stated that we were to bill the cost of the work actually done, I would like to see the blank form for payment, the application for payment. There is no provision whatever for quantities. It simply says so many dollars.

Q. Did you use the blank form for the first application you made?

A. That is my recollection that we did; yes, sir. We made applications before February 1st. We didn't get these blank forms on February 1st when this conversation was had.

Q. When did you get them?

A. We got them in response to a letter which we wrote to the Carlin Construction Company some time previously; in the early part of December I think we wrote for these blank forms on which we were to make our application to them for payments, and we received them and our first application was made on them. I think it was December 30th.

Q. Will you kindly point out to the jury now, after your voluntary statement, that that blank application says to base your estimate on the cost?

A. I said that this blank called for no quantities except dollars and cents; the amount of the original contract, the amount of extras and total, all in lump sums; and then the amount of work completed to date and the cash received in dollars and cents, and charges, and the amount of percentage reserved, which in this we considered to be

15%; amount of this application; date of contract, to be given and signed by us. This application does not call for quantities.

Q. Then when you told the jury that this application called for a percentage of the cost, you were mistaken, weren't you?

A. Not at all.

Q. Does this application in any way refer to the cost of the work you had done?

A. I don't know that I said that it was the cost of the per-
159 centage of the work; I said that a percentage was reserved; 15%, and it was to be 85% of the work done.

Q. Are you answering any question of mine?

A. I am trying to.

Q. This application makes no reference to the cost of the work to you does it?

A. It does.

Q. Will you show me the word cost in that application?

A. The amount of original contract, but the contract speaks of the cost.

Q. Don't please make any more volunteers. It takes me too long to correct them. The word costs does not appear there?

A. No, it does not.

Q. Nevertheless your first application for payment before you got these blanks was based upon the cost of the work to you, wasn't it?

A. Our first application was made on these blanks, as I recall it.

Q. And it was made on the basis of the cost to you, was it not? Do you know anything about it?

A. I don't recall; I should say that it was based.

Q. If you don't know, just say so. Don't say I should say so. Do you remember on what basis your first application was made? Was it the cost or what?

A. It was on the basis of the fair valuation of the cost of the work in place.

Q. Fair valuation, what you estimated it?

A. Yes.

Q. Did you receive from Mr. Joe Carlin a letter at Boston of introduction of Mr. Guerini to Fred Carlin down here when he came; do you recall it?

A. I don't recall it; I would like to read it. I perhaps would recall it if I see it.

Q. Do you remember their sending a letter up there to you (a letter press copy of a letter is shown to the witness)?

A. I have no recollection of that.

Q. Mr. Converse, I show you a letter of September 6, 1911, from yourself to the defendant; do you remember that letter?

A. I do.

Q. Did you at that time notify the defendants that you had not received any letter fixing the date when you were to commence your work at the San Juan job?

A. I did.

Q. That was true, wasn't it, that you had not received any

letter fixing the date when you should commence the work? Was it true or not?

160 A. To answer it properly it ought to be modified.

Q. Was it true or not and was this statement correct, which I read to you?

A. That we had not been able to start our work, yes.

Mr. Wait: I move that that be stricken out.

Q. I asked you if this were true that you had not yet received a letter from the defendants fixing the time when you might commence your work at the San Juan job?

A. Not entirely correct.

Q. Then this statement in this letter was not true, was it?

A. It was not entirely correct; it might be misinterpreted.

Q. It was partly true and partially untrue, was it?

A. Not at all.

The letter referred to by counsel is marked: 8 for the defendant for identification.

Q. Do you recall, Mr. Converse, writing several letters between July 2, 1911, and September 15, 1911, reciting that same thing, that we have not yet been notified when to commence our work?

A. No, sir; we probably——

Q. You don't remember; that is all I want. Do you remember that when you were directed to go ahead, proceed diligently or immediately, that you wrote a letter and said that you wanted to know when the three hundred days in which you had to complete your work, started?

A. I should probably have asked that, because it was important.

Q. And that meant the date of commencement and when the three hundred days should start, did it not?

A. I don't recall the particular letter which he refers to. If I may explain that whole situation I think I can do so.

Q. Explain it to your counsel. I don't want your explanation. You were solicitous, were you not, as to the time within which you were to complete your work?

A. We had a forfeit.

Q. Answer the question?

A. I was solicitous.

Q. Because you had to pay a certain amount per day on the time that you extended beyond the three hundred days?

A. Yes.

161 Q. And you were trying to get the defendants to fix the time when it was to begin to run?

A. No, sir; I was trying to fix the responsibility for the delay up to that time.

Q. And you wanted them to fix the date when they would count for your commencement of the work, didn't you?

A. The three hundred days, yes.

Q. Do you remember how many cubic feet, approximately, of concrete you placed, or your company, while you were on this work?

A. I remember only the amounts that have been given in the printed testimony of the last trial.

Q. Do you remember what that was?

A. I remember that Mr. Carlin testified.

Q. I don't want Mr. Carlin's testimony. Do you remember anything about it?

A. I know approximately; between 22,000 and 23,000 cubic feet.

Q. And do you know how many cubic feet 3298 cubic yards make?

A. I think 89,046.

Q. Then 22,000 and 89,000 is the way you arrived at the 25% of the work completed?

A. I think I said at the time that my recollection was that it was about 25%. That is what I make it now on that basis, approximately.

Q. Do you recall that about August 17, 1911, you made a proposal to do the structural steel, ornamental work, granite and brick in this building to the Carlin Construction Company?

A. I think we did.

Q. You can only think about it, is that right?

A. If I see the letter I can recollect it. As I recollect it, we did; at the price of $35,751. I think we wrote that letter; it is dictated by yourself.

The letter in question is marked: 9 for the defendant for identification.

Q. On August 17, 1911, you had not been delayed so much, nor treated so badly by the Carlins, but that you were ready and willing to do $35,000.00 more of work right here on this building, were you?

A. May I answer that by saying just what I meant.

Q. Answer it yes or no. If you had been so badly treated that you would not do $35,000.00 more of work for them?

A. Our reason for——

162 Q. Can't you answer my question?

A. I can't and express myself.

Q. Do you want to make a speech about it?

A. Not at all.

Q. You were ready and willing to do this $35,000.00 worth of work, weren't you?

A. Yes, we were.

Q. Of course you were. It was awful hard work to say yes?

A. No.

Q. How much concrete work had you done on August 17, 1911?

A. I don't recall; I don't think practically any.

Q. How much stone setting had you done?

A. I think none at all, judging from the reports which we received at Boston.

Q. Then so far as you recall, you had not done a bit of work on

this building except building your sheds and shops and making some moulds and forms, had you?

A. Quite right.

Q. Now on September 15th you were directed to go ahead with the setting of this stone and your work. What was the nearest date prior to September 15th, 1911, that you were here on the job?

A. The previous May as I recall it.

Q. You had almost daily reports from Mr. Follett, didn't you?

A. No.

Q. Did you get them once a week when the boat arrived?

A. We got letters almost once a week. I said this morning that one of the duties and one of the things that Mr. Follett did here was to make reports of this work. I presume we got them at that time, September 15th. I tried to keep in touch with the situation of this work.

Q. And on September 15th when you were told to proceed with the work you knew the situation and you immediately started to work to set the granite, didn't you?

A. We started as soon as we were able.

Q. You started to work at once, just as soon as you could after you got this notice on September 15th, did you not?

A. I was not here.

Q. Do you know whether your firm did here?

A. I understand that they did just as quickly as they could. We started this granite setting knowing the conditions here at the site of the work generally.

163 Q. On October 27th you sent two stone setters down here from Boston, didn't you?

A. Yes, if the records show that.

Q. Do you know that on October 28th Mr. Guerini was setting stone here alone with one laborer?

A. Not with one laborer; we had other stone setters here at that time, as I understand.

Q. Mr. Converse, do you know that you had a single stone setter here at that time?

A. I understood at the time that the two men who came down with Mr. Guerini were stone setters besides stone moulders. Mr. Guerini told me so.

Q. Nevertheless, on October 27th, on a complaint of the defendants here to you, you sent two more stone setters down, didn't you?

A. I sent two down; I don't know whether it was on a complaint or not.

Q. Don't you remember that there was any complaint about it?

A. I know that there were a number of letters written that had no foundation.

Q. You feel perfectly satisfied now, having said that?

A. By Mr. Oaksmith and by Mr. Carlin, yes. I do not know when they started to set steel down here.

Q. I show you a letter of July 21, 1911, for you to identify, Mr.

Converse. Your initials are on it. I suppose you dictated it (handing a letter to the witness)?
A. Yes, sir; I wrote that letter.

The letter in question was then marked: 10 for the defendant for identification.

Q. I ask if you identify that letter of July 10th as a letter that you wrote (handing another letter to the witness)?
A. I wrote that letter July 10th.

The letter in question was then marked: 11 for the defendant for identification

Q. I show you two letters dated, December 12th and December 14th from the defendant to the plaintiff and ask if you recall receiving those two letters (handing two letter press copies of letters to the witness)?
A. We received those letters.

The first letter identified by the witness is marked: 12 for the defendant for identification; and the second is marked: 13 for the defendant for identification.

164 Q. Now on December 12th, Mr. Converse, the Guerini Stone Company had notice, that of about 5,000 cubic feet of granite that you had to set, only 199 cubic feet had been actually set during the month of November, didn't you?
A. We received that letter, and that letter contained a statement to that effect.
Q. You also had notice that the balance of 100 pieces had been cut at Providence and would be shipped immediately?
A. That letter said so; I don't think it was so.

Mr. Wait: I move that that be stricken out, I don't think it was so.
The Court: No, sir; that will remain.
Mr. Wait: Note an exception.
The Court: Certainly.

Q. Now you had also notice on December 14th at the same time that of the 5,000 cubic feet that was in Porto Rico, less than 500 feet had been set, had you not?
A. We received that letter, which so stated.
Q. Now you rendered a statement, Exhibit 19, of quantities, dated March 9, 1912, showing that the total number of cubic yards of concrete was 573, did you not?
A. The total number of cubic yards laid, 573.
Q. How much granite had you set?
A. Granite set, 3460 square feet.
Q. Then of the 5,000 cubic yards of granite, on March 9th you had set that number and of the concrete you had laid 573, had you?
A. There were not 5,000 cubic yards.
Q. Well, feet; what is this 3460; feet?

A. Square feet of granite.
Q. Do you know how many cubic feet make a square foot?
A. I do not.
Q. Then you measured this in 3460 square feet; you don't know anything about how many cubic feet that made?
A. I do not; I don't recall.
Q. And up to this time of cubic yards of concrete you had laid 573 cubic yards?
A. Yes, sir. And we had 3298 cubic yards to lay, 3298.
Q. Then at that time up to March 9, 1912, you had laid
165 about one-sixth of your concrete, hadn't you, according to your own statement?
A. No, sir.
Q. How much is it?
A. We had laid the 573 cubic yards as compared to 3298.
Q. Were these quantities taken from the engineer's quantities, engineer's measurements?
A. I think they were our own measurements, but I don't recall exactly.
Q. Don't you know where you got them?
A. I don't recall at the present time.
Q. You don't know anything about whether they are correct or not then?
A. I do, I consider them correct.
Q. And you had been from the notice of September 15, 1911, to March 9, 1912, laying 573 cubic yards of concrete and 3460 square feet of granite?
A. Yes, sir; all that time.
Q. How many men did Mr. Guerini bring from Boston down here when he first came?
A. I don't recall the exact number.
Q. Were there more than one?
A. It was a small number, one, two or three.
Q. Don't you remember how many he brought?
A. I don't remember exactly the number, one, two or three; I think possibly one or two. I do not know how many he employed, the first two or three months here.
Q. You don't know how many men Mr. Follett had down here to boss or to take care of?
A. I knew at the time, but I do not know now.
Q. What did you pay Mr. Follett a month?
A. I paid him twenty dollars a week and his board and expenses.
Q. What did that amount to altogether?
A. I think about $70.00 a month to $75.00 total.
Q. Twenty dollars a week, four times twenty would be eighty, wouldn't it?
A. Yes, I think his board was somewhere around fifty or sixty dollars a month.
Q. That would be about $130.00 or $140.00 a month; wasn't he a pretty expensive boss for Mr. Guerini and two men?
A. I don't think so.

Q. And with the Vice-President of your company, Mr. Guerini, an expert in concrete and in moulding artificial stone, you felt that you wanted a superintendent or a man in charge over him and two men, did you, at $140.00 a month?

A. Yes, sir.

166 Q. And you want to charge this defendant with that expense too, do you?

A. Yes, sir.

Q. Wasn't Mr. Guerini capable of handling two men down here on work in which he was specially qualified?

A. He couldn't handle any work for us alone; we wouldn't have him.

Q. Mr. Guerini was a bad egg, was he?

A. I don't know.

Q. Now, Mr. Converse, in your applications for payment, you did not expect or want this defendant to pay you any more than what was due you under the terms of your contract, did you?

A. No, I did not.

Q. And your application for payment in Exhibit 18 and in your letter of March 9th and in Exhibit 22 and Exhibit 24 that you have put in evidence, and your letter on February 6th, in every instance when you made your application you say you want payments in accordance with the contract and that is what you meant, wasn't it?

A. Yes, sir.

Q. And you didn't want anything except payment in accordance with your contract, did you?

A. No, sir; payments in accordance with our contract.

Q. And when you say that Mr. Carlin promised to pay you $1.07 a cubic foot, if that was greater or in excess of your contract you didn't want him to pay you that?

A. That was not in excess of our contract if you take the expense which Mr. Carlin had caused us during that ten or eleven months hanging around here.

Q. I see, you were expecting Mr. Carlin to pay you for your losses and damages in that $1.07 per cubic foot; was that it?

A. No, sir; we had an express agreement.

Mr. Wait: I move that that be stricken out.

Q. I ask you again, you didn't want Mr. Carlin to pay you anything more than was due you under your contract, did you?

A. I thought that was it.

Q. Answer my question.

A. No, sir.

Q. And you didn't want him to pay on this schedule with units of prices against units of quantities, you were not figuring in losses and damages or expenses in that application, were you?

A. We were figuring what we thought was due us at that time.

167 Q. What you thought was due as a matter of equity and good morals?

A. We thought we were entitled to it.

Q. You didn't understand when you made the statement of the quantities and prices, that you were receiving any damages and losses and expenses due to delay, from the defendants, did you?

A. No, we expected——

Q. That is all I want. When you first came down here, which I think was in May, 1911, did you see any derricks on the job?

A. You try to put me in the hole all the time. I didn't come down here first in May. I told the jury that I came down first in the latter part of February, landing here about February 23d. I did not see any derricks at that time. I didn't see any derricks at all then, no stiff legged derricks.

Q. Did you look for any?

A. I don't know that I did. I don't recall any discussion with the defendants about derricks.

Q. When was it you came down the next time?

A. I think it was in May, 1911.

Q. Did you see any derricks then?

A. No, I think there were none at that time.

Q. What I want to get at, Mr. Converse, is, do you know anything about this matter of stiff legged derricks being changed to guy derricks; did it come to your attention?

A. The derrick question came to my attention, through the correspondence, and the correspondence speaks for itself on that. I should say it came up, about the time they called on us to set the granite. I think it was about September 15.

Q. I show you a photograph in the old record, dated October 2, 1911, and ask you if you see there on that date two boom derricks set up with guys and tackle.

A. I do.

Q. With that to refresh your recollection, was it not before September 15th that this question of derricks came up?

A. This does not refresh my recollection on that point.

Q. Does that look familiar to you? Did you ever see that work when it was in that position?

A. No, not for several months later.

Q. With these derricks all erected and their rigging, would you say that it was as late as September 15th when that matter was
168 brought to your attention? Wasn't it previous to that?

A. It was brought to my attention through letters and those letters show definitely just when it was.

Q. Did you know from these letters from Mr. Carlin and from Mr. Follett that the stiff legged derrick had been objected to and had been transformed and built over into guy derricks?

A. Yes, I think I was cognizant of that.

Q. You knew that Mr. Guerini didn't want a stiff legged derrick and would not use it, or was it you that wanted the guy derricks?

A. I think it was Mr. Follett; I am not sure about that.

Q. You do recall and remember that the stiff legged derricks were not wanted and would not be used and they insisted on guy derricks, don't you?

A. Yes, I think so.

Q. And do you remember that there was some difficulty in getting the long wire ropes for the guys?

A. I was not advised of that.

Q. Were you cognizant, or *hear*, when there was delay on account of the electric railway company not being able to deliver stone because a certain bridge was being repaired or taken down?

A. I don't recall the incident. I don't know anything about that. I do not recall about Mr. Guerini's motor burning out. I don't remember passing a check for $300.00 to repair it. I do not remember a water pipe bursting and flooding the works.

Q. Those things were not reported to you, were they?

A. I don't recall them, if they were.

Q. I see in your itemized statement of your expenses that you state that there was a concrete hoist; do you remember what that was like or what it was?

A. It was a Meade-Morrison hoist. It takes the place of a double drum engine. It is merely a hoist for pulling in ropes for hoisting with block and tackle. I don't know as anyone would speak of a concrete hoist. A concrete elevator is the elevator frame of four posts diagonally braced with a wheel at the top and you lift a bucket by means of a wire rope that comes up over the wheel and down to the bucket and to the drum and that hoists the load of concrete up, and in most cases in the States it is a bucket that dumps at a
169 certain point into a hopper and then runs down.

Q. Is that the kind of a hoist that they had here?

A. Yes, we didn't dump into a hopper. That is the kind that we sent down here.

Q. You charge us in here, for a concrete hoist, is that the kind of a hoist you charge us with?

A. Yes, that is it. These power saws were wood working machinery, for cutting lumber. These moulders' tools were moulders' tools for Mr. Guerini, and his men.

Q. If you were hiring a moulder, Mr. Converse, would you expect to supply him with his tools, especially if he was one of the most expert moulders and concrete workers in the whole continent?

A. I have had considerable experience in that line. We would expect to furnish him his tools.

Q. And it is customary to furnish the moulder with his moulder or moulding tools, is it?

A. Not entirely; Mr. Guerini brought some of his own tools down.

Q. What were these, tools for moulding in clay and plaster of paris that you bought for him?

A. They were tools for the plaster moulds. For moulding in clay and producing plaster moulds.

Q. They were artists' tools, were they not?

A. They were tools which are used in making plaster moulds.

Q. Which is artists' work, isn't it?

A. Yes, sir.

Q. Do you know where this concrete hoist was set up on this building?

A. I saw it set up.

Q. Was it in the northeast corner in the elevator shaft?

A. I don't recall. The government has taken photographs and they show exactly.

Q. Now I didn't ask you that. Do you remember where that elevator hoist was?

A. It was on this side of the building and to that side of the center of the building.

Q. Would you think it was remarkable that Mr. Follett didn't remember anything about it?

A. I would think it was very remarkable if Mr. Follett didn't remember anything about the concrete hoist.

Q. These checks for expenses include Mr. Lootz's expenses
170 down here and back?

A. They did and I gave the individual check to pay him.

Q. How long was Mr. Lootz here?

A. I don't recall. Perhaps a couple of weeks, a short time, he may possibly have been here three weeks. He came here in the latter part of December.

Q. With this to refresh your recollection, December 19th he arrived, will take charge, and he went away the 29th; he was here exactly ten days; would you say that was correct?

A. If you are giving it to me fair and straight I should say it was correct.

Q. Was that within your knowledge?

A. Yes.

Q. Do you think it is fair and reasonable to charge these defendants for ten days' expenses down from Boston and back for Mr. Lootz, a proposed superintendent?

A. Yes, they brought the situation on themselves.

Q. And did you have at that time Mr. Guerini, Mr. Follett, and, while Mr. Lootz was here, three men in charge of this work?

A. Not three men in charge.

Q. Who was in charge?

A. Mr. Follett was in charge.

Q. Did you write a letter to the defendant that Mr. Lootz will take charge?

A. Yes, of the work, yes.

Q. Mr. Lootz was sent down here as superior to both Mr. Guerini and Mr. Follett, wasn't he?

A. No, he would get his orders from Mr. Follett.

Q. What did you mean when you said to take charge?

A. The defendants had been writing numerous letters about the setting of the granite and we had been explaining to them that *is* was not delivered to us in such quantities that we could set it.

Q. Is that speech necessary to answer that question? What does take charge mean?

A. It means take charge of the work on the building. He came down to take charge of the granite and the situation which arose out of that.

Q. I show you a letter of December 29, 1911, and ask if you wrote that letter to the defendants.

A. Yes, I wrote that letter.
Q. Was it true and did you mean what it said?
A. Oh, yes.

(The letter in question is marked 14 for the defendant for identification.)

171 A. May I have the date of that last letter?
Q. December 29th. When you said this in this letter, "please note we have sent our Mr. Lootz to San Juan to take charge of the work and all communication which your representatives on the job desire to make to us should be made to him," did you mean that?
A. Yes. I don't consider that putting Mr. Lootz in charge of this work here, but only the granite.
Q. Did you mention granite at all in this letter?
A. No, it was meant that they should take their matters up with Mr. Lootz. They seemed to have gotten into a good deal of a fight with the other men down here and I thought if they had their talks with that particular individual, they would get along easier.
Q. Ten days was as long as you could keep Mr. Lootz down here, was it?
A. As long as he stayed; approximately that time.
Q. Who was E. P. B.?
A. Mr. Bliss, my partner. He was an officer of the Guerini Stone Company. He dictated letters for the Guerini Stone Company. He did it under my direction, from time to time.
Q. I show you a letter of December 29, 1911, and ask you if you were cognizant of that letter.
A. This is a letter to Mr. H. C. Lootz.
Q. Do you know anything about that letter?
A. I don't, but I should suppose that it had been written.
Q. Written by your company?
A. It appears to be directed to Mr. Lootz.
Q. Now, Mr. Converse, did you know anything about the samples that were sent from San Juan to the defendants and to Washington by Mr. Carlin?
A. I knew that samples were sent. I don't think I saw them at all. I don't recall any correspondence with reference to them unless I wrote the letter regarding the sending of them, and that we would like to have the information about it. I do not remember that there was considerable delay in getting the samples accepted by the government. I think it took a good long time; I don't recall.
Q. You would rather call it a good long time than call it a delay, is that the idea?
A. Oh, no, not at all. I do not remember that there were
172 some fourteen piers, down in the basement, that were torn down and rebuilt by the Guerini Stone Company. I didn't know that they were condemned and had to be torn down. I did know that we billed you for it.
Q. Then you knew something about it?
A. I knew that certain piers were torn down and we would not

rebuild them until the Carlin Company told us they would pay us for them.

Q. Do you know that the Carlin Company ever told you that?

A. No.

Q. Then why do you say it?

A. I didn't say that they said they would pay us for them. I think I said until I got an order for them. I understand we did get an order for them. I understood it from Mr. Follett who was down here at the time. I was in Boston. We billed them at $300.00.

Q. Did you know anything about any mistakes in the setting of the granite by Mr. Guerini?

A. Personally I don't know.

Q. Did you know that any mistakes were made, that the granite was set too low several times? Never mind who made the mistake.

A. I remember that there was some such incident, that the granite was set too low. I do not remember that when the granite was set on the front of this building it was set at an angle.

Q. These mistakes that may or may not have occurred on the building were not reported to you by Mr. Follett who made these frequent reports to you?

A. I don't remember anything of that kind.

Mr. Wait: Your witness.

Redirect examination.

By Mr. Paine:

Q. Now in your cross-examination, Mr. Converse, Mr. Wait examined you with regard to the difference, if any, in expense between the outside walls of the building and the concrete interior walls and floors. Have you any explanation to make to the jury about that?

A. The concrete walls such as that exterior wall, you will note, have quite a thickness. Now the forms per square foot for a thick wall of that kind are less for a cubic foot of concrete than they are for a thin slab, and therefore there is less expense regarding the forms.

173 Mr. Wait:

Q. You are speaking of the forms now.

A. The concrete per yard is cheaper on account of the less expense in the form.

Mr. Paine:

Q. Now is there any additional expense in finishing the surface of the concrete which has been termed artificial sand stone?

A. In concrete which is put up in forms, your forms may not be exactly meeting. There may be little fins of concrete which have run between the boards or in the cracks. Now the form is taken away and some material like a carborundum block is taken and the concrete rubbed down until you get a smooth surface, but that has nothing to do with the concrete. It is the same concrete as it was

before, and in order to get the imitation of sand stone as it is called, we simply use a concrete spade which we sent down among our first shipment from Boston, a special spade for that purpose, which is put down in the front of the form and the stone is worked back from the front of the form so that the sand and cement and water run to the surface and that gives a smooth surface with no stone in it, and that is the way the imitation sandstone is made, and if you want to get it smooth you rub it until it reaches a satisfactory smoothness. There is no mystery about making imitation sandstone.

Mr. Wait:

Q. You don't know anything about how it was done down here do you?

A. I am speaking about how we laid out to do it when we came down here.

Mr. Paine:

Q. Is the additional expense entailed in putting the smooth finish on the so-called imitation sandstone, which was called for for the exterior walls of the building, substantially greater in amount than the greater expense in connection with the interior walls and floors resulting from the fact that the interior walls and floors are narrow and therefore require more wooden form work per cubic yard of concrete?

Mr. Wait: I object to this testimony because this witness knows nothing about what was done on this work.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

174 A. It would not cost any more, and the specifications distinctly state or give you the opportunity to make this imitation sandstone in any method that you may desire. They speak of one, but specifically state that you may make it as you please, but under the supervision and to the satisfaction of the government.

Q. Isn't everything in the contract subject to the satisfaction of the architect? Isn't that the case in every construcion contract?

A. Yes, sir.

Q. Now you were asked on cross-examination about the estimate that you made before you agreed to take over this Guerini Stone Company contract; when you calculated labor in that estimate did you know where you were going to get your labor?

A. I did.

Q. Where were you going to get it?

A. We calculated or our estimate was based on getting our labor in the States, our own men that we use, and that we understand would be a maximum cost and if we could get any labor down here at any cheaper price, we would fill in with that. But our estimate was based on what it would cost to send our own men. As a matter of fact, we did send our own Italian men who had used the concrete mixer.

Q. In making that estimate did you include steamship fares to and from the States?

A. I did.

Q. In making that estimate did you include Mr. Guerini's salary, Mr. Follett's salary and expenses and their travelling expenses to and from the States?

A. I did.

Q. Did you know what they were going to be?

A. Approximately, yes.

Q. So that are there any items entering into the final estimate which you made in preparing the matter for this trial which are different from the vouchers entering into the first estimate before you accepted this contract?

A. No.

Q. Except the time of completion?

A. Except the time of completion; we were delayed in our work.

Q. Mr. Wait stated to you that the overhead charges were high. Can you explain why that was?

A. On a job of this character they would always be high, a job which is located far from your home office. For instance, our home office is in Boston and if we are going to do a job at a distance, the overhead expense which we speak of would be greater. We have to travel back and forth and our time going back and forth would be greater than that of a man, who lives in the town. If there was a man equally equipped in that home city, he could do it much cheaper than I could because he would not have the additional expense of travel.

Q. What, if any, effect on the overhead, would delay in the completion of the work have?

Mr. Wait: Now I certainly object.

The Court: The objection is sustained. It seems to be leading.

Mr. Paine: Note an exception.

Q. When you made your last estimate on which you based your claim for profits, what time did you calculate as a reasonably proper time required to complete this job?

A. As a maximum, two hundred days. We figured on the capacity of our mixer turning out thirty yards of concrete. We ordinarily had about eighty; we practically cut it in half. According to that it would be about one hundred days. We doubled that and made it two hundred days, so I took Mr. Follett's time and Mr. Guerini's time and the overhead expenses of that kind on the basis of about two hundred days. Any time that we had to be over two hundred days.

Q. Let me interrupt, Mr. Converse. If there had been no delay of any kind or anybody, would the amount of concrete poured by you between the time when you started pouring concrete and the time when you stopped have been a fair and reasonable amount of concrete to pour with the men and equipment you had on this job.

Mr. Wait: I object to that as not having all the foundation it should have, and further, as being speculative purely.

The Court: The objection is overruled. This is an expert.

Mr. Wait: Note an exception.

Mr. Paine: I would like to add: and with reference to this job as appears from the testimony in this trial.

176 Mr. Wait: I object to that, as appears from the testimony in this trial. I never heard of a hypothetical question embodying all the testimony in the trial.

Mr. Paine: The jury has heard the testimony.

Mr. Wait: I object to it.

The Court: The objection is overruled. This particular witness has been in the court room all the time.

Mr. Wait: Note an exception.

A. It was a fair and reasonable time and a fair amount of concrete to make in that time. I would have no hesitation in saying that; amply within reason.

Q. With the equipment to which you have testified as being on the job here in San Juan, what capacity in number of cubic yards of concrete could you make in a day without delay?

Mr. Wait: He has testified to that; thirty.

Q. Is that right?

A. Without question we could produce thirty cubic yards per day. The capacity of the machine was about eighty.

Q. Continue any explanation you can give as to why the overhead charges appear high.

Mr. Wait: That is objected to. After having tried leading questions he comes back to the question to which I objected and which was ruled out.

The Court: The objection is sustained. The witness has already answered that question.

Mr. Wait: I think the jury understand perfectly that if it takes a year to do a piece of work it costs more than if it takes a month. The jury have some intelligence in that matter.

Q. Now Mr. Wait asked you why you didn't charge any overhead expense for setting the granite in your estimate which you testified to on the stand. Did that estimate refer to the granite at all?

A. No, it referred only to concrete.

Q. Is there any great difference in cost between setting moulded stone, and by that I mean artificial stone which has been made out of concrete with decoration on the face made on the ground and later set in the wall, is there any difference in the expense of setting such a stone, once it is made, and setting natural stone?

A. No.

177 Q. Now I show you a letter dated September 15, 1911, addressed to the Guerini Stone Company, signed P. J. Carlin Construction Company, J. P. Carlin, Secretary, and ask you if that is a letter which you received from the defendant.

A. Yes, sir; this is the letter of September 15th which we received.

Q. Was that in reply to the letter which you wrote, which Mr.

Wait showed to you, wherein you said something about asking for the fixing of the time when your work started on the job?
A. Yes, sir.

Mr. Paine: I offer this letter in evidence.
The Court: Any objection?
Mr. Wait: No.
The Court: It is admitted.

The letter in question was then placed in evidence, maked Exhibit 26 for the plaintiff, and read to the jury by counsel.

Q. Were you here in Porto Rico at that time? Were you here after February 28th?
A. No, sir.
Q. On what was your information in making this application based?

Mr. Wait: He said on reports.

A. My information was based on reports from my organization here in San Juan, reports mailed to me at Boston.
Q. So that the reports on which you based that application were at least one week old, were they not?
A. Yes, sir.

Mr. Paine: That is all except the record on the first trial.

Recross-examination.

By Mr. Wait:

Q. Mr. Converse, notwithstanding the reports of Mr. Berryman, which you said he told you about, and the position taken by the Supervising Architect as to the value or cost of the concrete above the first story and that below the first story and between the basement floor and the first story, do you still say that the concrete in these interior walls and these floors and in the basement is just as expensive and costs just as much as this face work on the south side of the building did?
A. I do.

178 Q. And you don't agree with Mr. Berryman and with Mr. Heald and with the Supervising Architect that Mr. Berryman should refuse the allowance of Mr. Stierle that he had made for the basement work up to the first floor at the same price as the rest of the work do you?

Mr. Paine: I object to the question on the ground that it seeks to bring into the record things which ought to have been brought out in the direct evidence.
The Court: The objection is sustained.
Mr. Wait: Note an exception.

Q. This artificial stone work you knew had to be done in the

manner and to the satisfaction of the government architect, didn't you?

A. Yes, sir.

Q. You don't know how he required it to be done?

A. My recollection of my knowledge at the time; I read the specifications over when I made my original first estimate.

Q. Now I ask you again, do you know how, when this work came to be done, the Supervising Architect or his representative required it to be done?

A. No, I don't know anything about what was required when it was done by Mr. Carlin.

Q. Did you know that the Supervising Architect required forms to be set and then required that they should be plastered clear around on the inside before the concrete was poured in?

A. That was stated in the specifications with the privilege of using any other method.

Q. Do you feel that that is an answer to my question?

A. I do.

Q. Then you did not know that the architect required the forms to be plastered on the inside?

A. I did not.

Q. Couldn't you answer that and say you did not?

A. You changed the question every time.

Q. What ingredients and what proportions were specified for the concrete footings?

A. I don't recall that.

Q. Did you bid on that work?

A. The Guerini Stone Company made a figure for doing the footings.

Q. Six dollars and seventy cents was it?

A. They made a price of $6.70 per cubic foot and that was recorded in the contract.

Q. And you consented and agreed that it meant cubic
179 yards, didn't you?

A. I called it to the attention of the Carlins later when I came into the matter and consented to initial and have it changed to cubic yard.

Q. A plain mistake, wasn't it?

A. I don't know what it was.

Q. You consented to this correction in the belief that it was a mistake, didn't you?

A. I did.

Q. Do you know what the proportions and ingredients were for the flooring in between the I-beams?

A. That was one, two, four.

Q. Was it the same from the basement up in the piers and walls?

A. It was the same except that the face was to have a sandstone finish, the stone not showing in the face. It was the same mixture. That is my recollection of the specifications, of my reading of them.

Q. What materials were specified for the imitation stone here on the exterior?

A. I think the same mixture.
Q. Now are you just thinking; is that all?
A. To the best of my recollection.
Q. You don't recall that it required any richer mixture or any different materials?
A. Nothing except the keeping of the stone from the surface, giving the sandstone finish as I have explained before.
Q. Is that color on the south front the same all through the whole wall?
A. I never have seen a job done in my life, in which the color was the same everywhere on it. If there is a little oil or a little dirt or a little moisture in the moulds or the sand is of a different shade, you will have a difference in the color, and that is one unavoidable difficulty about concrete.
Q. Is there any difference in the color due to oil or dirt?
A. I don't know what it is due to. There is a difference of color.
Q. It is the same material and quantities all through the wall as you understand it?
A. I don't recall. As I said before, the exterior surface is a sandstone finish and has no stone in it. The stone is crowded back. It is simply sand and cement.
Q. Don't you know that the south wall for an inch or an inch and a half or two inches is entirely different from the materials
180 and the character of them in the wall behind that?
A. I think it is and I have explained it.
Q. Then why don't you say yes?
A. I do say yes.
Q. If you make up in a form a veneer of two inches, in your opinion, does that increase the expense of it?
A. I should say you were a novice in the art.
Q. Can't you answer my question without making a speech?
A. No.
Q. I don't know now whether it costs more to put a veneering on a wall two inches in thickness.
A. It wouldn't have cost us any more. I don't know whether it would cost you more or not.
Q. Would it cost any more in the ordinary operations of work?
A. To have a sandstone finish?
Q. To have a sandstone veneer on the face of it.
A. No.
Q. It would not cost any more?
A. No.
Q. When did you make this estimate on the labor in the States at a maximum cost which was based on your knowledge of that and on the steamship fares that were included for Mr. Guerini and his associates; when did you make that estimate?
A. Oh, I don't recall; I have made several.
Q. Do you know anything about what year it was in even?
A. One of them was made two or three days ago. Another was made during the year 1912. I don't recall what month. Another

was made the last few days possibly of December, 1910, or the first few days of January, 1911.

A. One was before we undertook the work, not before Mr. Guerini or before?

A. One was before we undertook the work, not before Mr. Guerini got the contract. It was between the time Mr. Guerini took the contract and the contract was assigned to the Guerini Stone Company, a corporation organized in Massachusetts, and consented to by the Carlin Construction Company too.

Q. Now I think you testified that this work should have been done reasonably in a maximum of two hundred days, didn't you?

A. I did. By the Guerini Stone Company or the Carlin Construction Company, the concrete in our contract, that should have
181 been done in two hundred days. We were ready to go ahead with that work, to make progress on September 15th.

Q. And you wrote a letter to the Carlin Company asking them to specify distinctly the time within which your time was to run when you should begin work.

A. Fixing the date on which the work could be commenced in a reasonable manner. Fixing the time within which we were to be directed to do the work and have it a matter of record, we asked to have the time fixed. And our purpose of that was, so as to know when our three hundred days expired.

Q. Do you remember writing a letter to the defendant, and asking that they should be reasonable with you and give you all the time they possibly could to do your work?

A. No, on the notification prior to taking up——

Q. You say no, do you?

A. Yes, sir.

Q. And you don't recall that you wrote a letter to them after September 15th asking that they should give you all the time they possibly could to finish up the work?

A. No, I don't.

Q. If you could do it reasonably without any doubt in two hundred days, you would have written such a letter, would you?

A. Oh, yes.

Q. Notwithstanding that you had three hundred days after September 15th and that you could do it in two hundred days, you would still write a letter to these defendants and ask them to be reasonable, would you?

A. No, you are injecting a wrong interpretation into that. I remember writing a letter and if you will produce the letter I will tell you what I meant by it. They said go ahead and set granite.

Q. You don't remember writing a letter asking these defendants to give you all the time they possibly could to do the work in after they had ordered you to go ahead on September 15th.

A. No, I don't remember in any such way as that.

Q. Concrete mixers don't determine the rapidity with which work is done in concrete work, do they? Isn't it the forms and the moulds which determine the speed with which you do work on the building?

A. If those moulds and forms required a two yard mixer
182 and you had only a half yard mixer, the speed would depend upon the mixer.
depend upon the mixer.

Q. I ask you again; isn't the speed with which a concrete building is poured dependent upon the forms and not the size of the concrete mixer?

A. It is dependent upon all of those factors, just as much on the concrete mixer. You can't pour concrete without mixing it.

Q. If you had a quarter of a yard mixer it would probably depend considerably upon it.

A. If you had a quarter of a yard mixer it would be too small and therefore the mixer is a very important factor.

Q. Mr. Converse, if you have any conscience at all, don't you know on a building that the progress of the work depends upon the forms rather than the capacity of your concrete mixer?

A. I know that it depends on other things besides the forms and it depends on the forms also.

Q. You did not fix the price for setting the granite, did you?

A. No, sir; that was in the original contract.

Q. And when you did that, when you were directed to do it on September 15th did you expect to do it at a profit?

A. We certainly did.

Q. And if you were doing work on a building at a profit, shouldn't that bear part of the overhead charges?

A. No, sir.

Q. No, sir is enough. That is all I want from you.

Mr. Wait: That is all.

Redirect examination.

By Mr. Paine:

Q. Mr. Converse, when you gave your estimate for the purpose of estimating profits on the concrete work, did you have any reference to the granite work at all?

A. None whatever, and the granite work was not included in it. We had a separate price for the granite and it carried itself and it
had nothing to do with the concrete estimate or the estimate
183 of profits on the concrete.

An adjournment of Court was had at this time until June 3, 1916.

June 3, 1916.

Redirect examination of the witness H. P. CONVERSE.

Continued by Mr. Paine:

Q. At the first trial of this case did you give the following testimony: Q. Now direct your attention to the interview with Mr. Carlin in New York when you were handed that schedule of amounts,

and tell us very fully what took place and how it came that you were given that schedule.

A. He had side-stepped on payments just as long as we thought we could stand it, and I went to New York on February 2d and insisted on some sort of payment to us for the work done, and at that time we received a check for some thirty-seven and odd dollars for the work done up to the end of December, and based on our December application for payment. This was on February 2d. No money had been paid to us previous to that time.

Mr. Wait: This is going beyond what we agreed, and before the jury I will make the admission that Mr. Converse did testify that Mr. Carlin said he would pay him at $1.07 per cubic foot for this concrete, and with an apology I make that admission and I object to the reading of the testimony of the former trial because it contains foreign matter and in addition to the point raised.

Mr. Paine: I am entitled to bring out in a proper way before the jury, this matter.

The Court: This is re-direct in one shape or other and must be based on the cross. Now what did this witness say on the cross that makes this applicable?

Mr. Paine: You will remember that Mr. Wait conducted this line of examination yesterday on cross-examination. He asked Mr. Converse if he had not read the decision of the Supreme Court in this case and he said he had and he asked if the decision did not emphasize the fact that the agreement as to units was of importance and he then asked him if it was not the result of his reading that de-
184 cision, if in effect he did not think up this testimony after reading that decision.

Mr. Wait: No, I deny that. I asked him if he didn't think that it was necessary to prove that in order to premise any breach. That question was ruled out by your Honor, and I agreed then that if I was mistaken, we would correct it this morning. I make the admission with an apology because I had not read his testimony. I read it this morning and I now make the admission.

The Court: Do you wish to get in all that he testified to on that point now?

Mr. Paine: Yes.

Mr. Wait: The sole and entire question was, did you testify at the last trial that Mr. Carlin promised to pay you $1.07 per cubic foot, and that I admit he did.

The Court: And it is before the jury that this witness so testified at the former trial. Now you wish to bring out all that the witness testified to on the former trial?

Mr. Paine: With regard to that particular interview in which the agreement was made. I am entitled to show that his testimony at the former trial was the same as it is now because the tendency of the cross-examination was to cast doubt on Mr. Converse's veracity and to create the impression that he had polished up his testimony as to this conversation.

Mr. Wait: No, not that; whether he had testified this time and

the other time that Mr. Carlin promised to pay him $1.07 per cubic foot is the only point at issue.

The Court: You admit that he testified that at the former trial?

Mr. Wait: I have twice on the record.

Mr. Paine: I merely wish to show that he did so testify on the former trial. An admission of counsel is one thing, but I
185 would like to prove what I can prove, to show that he is not admitting anything. He has to admit it because the record shows it.

Mr. Wait: I submit if he has any further examination of this witness, that he may ask him any further questions he likes with the Court's permission, but to read the former testimony of the witness he is not entitled to do.

Mr. Paine: Counsel opened that up. He brought it up himself.

The Court: You may read the testimony on the former trial where he says they agreed on that fact of $1.07, but not whatever else was said at the same interview. Counsel has agreed to it but if you wish it in the words of the witness you may read it.

Mr. Paine, reading from the testimony of the witness at the former trial; and it was agreed that we were to make our application and have our payments on the basis of this schedule.

Mr. Wait: That of course is objectionable and should have been objected to at the time because that is a conclusion.

Mr. Paine: That is what he testified to.

Mr. Wait: I ask that that be stricken out.

The Court: Yes, that will be struck out.

Mr. Paine: I am offering this to rebut the inference in cross-examination that the testimony has been modified, polished or changed in any way between the two trials.

The Court: Find that particular statement. That seems to be the only question in issue.

Mr. Paine: That was not brought out in one statement and that is why I was offering to read it all. I cannot read all the different elements of the conversation without reading it all, which puts in the whole conversation and which does not include merely the reference to the $1.07. The meat of it is what I have just read, that it was agreed that we were to make our application and have our
186 payments on the basis of this schedule. Now I understand counsel to object that the witness answered on the former trial that this was the agreement. There was no objection made on the former trial.

The Court: Then it is not stated anywhere that the agreement was $1.07?

Mr. Paine: Yes, that was brought out.

The Court: Then I will let you show that.

Mr. Paine: Counsel states that he is willing to admit that Mr. Converse testified that Mr. Carlin agreed.

Mr. Wait: Not agreed.

Mr. Paine: Promised to pay him $1.07 per cubic foot of concrete.

Mr. Wait: At the last trial.

Mr. Paine: At the last trial.
Mr. Wait: I so agreed and so stipulate.
The Court: That is agreed between counsel?
Mr. Wait: It is.
The Court: Proceed with some other matter now.
Mr. Paine: This is the last question I shall ask, your Honor, on this.

Q. Now I show you a letter dated January 27, 1912, to the P. J. Carlin Construction Company and signed: The Guerini Stone Company and ask you if you sent that letter to the defendant.
A. I did.

Mr. Wait: Well this is replete with self-serving declarations. If counsel will indicate and point out what he thinks he is entitled to show that this letter contains, I would be very happy to assist him in facts that are material and proper in the record.
The Court: Can you agree on that?
Mr. Paine: I think I will follow your Honor's ruling that where a portion of the letter is material, the letter shall be submitted to the jury subject to your instructions.
Mr. Wait: And I object to that because of the influence upon the jury of having go before them evidence that is not material,
187 and of the possible effect of it upon the jury, with all respect to the Court's ruling, whatever it may be.
The Court: It is a difficult problem how to proceed. There are difficulties each way. I will adhere to my former ruling and let the letter in, simply stating to the jury that the part material to them is only a statement, whatever you tell me it is.
Mr. Wait: I would submit, if the Court please, that I don't consider that any part of this letter is material being solely and entirely self-serving declarations, and counsel does not point out what material part he wants to show.
Mr. Paine: This letter is offered to rebut the letter referred to the witness and identified on cross-examination for the purpose of showing that Mr. Lootz superseded Mr. Follett as being in charge of the job in San Juan, and the letter is offered to prove that Mr. Lootz did not supersede Mr. Follett.
Mr. Wait: With respect to that, it is a self-serving declaration of the company itself.
Mr. Paine: It is a letter communicated to the defendant.

The letter in question is handed to the Court.

The Court: The letter is admitted. The Court will not undertake to cut out a part of it. It will simply charge the jury.
Mr. Wait: Kindly grant an exception.
The Court; Certainly.

The letter in question was then placed in evidence: marked Exhibit 27 for the plaintiff, and read to the jury by counsel.

The Court: Gentlemen of the jury, that letter is admitted as a

number of others in this case, as evidence in this particular instance of what is said in regard to Mr. Lootz. It happens to be important in the view of one side of this case as to the powers of Mr. Lootz, what his position was. The recitals in the letter of what hap-
188 pened in the past are no evidence of anything before you. It is difficult to disassociate the two, but I don't know any way of cutting the letter in two. All I can do is to tell you what part of the letter to regard. I ask counsel to mark the part which is important.

Mr. Paine marks on the margin of the letter the material part.

Mr. Paine: That is all.

Mr. Wait: I ask counsel for plaintiff for a letter of September 6, 1911, from the plaintiff to defendant. I misplaced my copy.

Recross-examination.

By Mr. Wait:

Q. I show you a copy of a letter from your files dated September 6, 1911, and ask you if you remember writing that letter to the defendant.

A. I received this letter.

Q. No, you did not receive it. Look at it.

A. No, I mean I sent this letter.

The letter in question is marked: 15 for the defendant for identification.

A Juror: May I ask a question?

The Court: Certainly.

A Juror:

Q. Mr. Converse, in computing the amount of your claim did you figure out the price of concrete placed at $1.07 per cubic foot?

A. No, sir; we have only put in the amount of money that we have expended in payinb out bills and paying out payroll and our passages down to Porto Rico to the Porto Rico Steamship Company, and the bills which I read here yesterday; just the amount of cash we have expended. It has nothing to do with our estimates. We have included our expenses that we were put to in doing the work.

Mr. Paine: I don't think that answers Mr. Castro's question. Mr. Castro, I think wants to ask whether the unit of $1.07 per cubic foot was the same as the cost per cubic foot when you estimated the job.

Mr. Castro: No, that is not it.

Q. The claim is for fifty odd thousand dollars I under-
189 stand. Did you figure that on that basis?

A. No, not on the basis of $1.07 per cubic foot.

Q. In arriving at that amount, you did not figure it on the basis of $1.07 per cubic foot?

A. Oh, no, not at all.

Witness withdraws.

Mr. Paine: We have a stipulation as to Mr. Berryman's testimony taken at the other trial, which I wish to read.

It is hereby stipulated by and between the undersigned attorneys of the respective parties hereto that all or any of the questions put to and the answers thereto made by G. R. Berryman, as a witness called at the former trial of this cause, as the same appear in the minutes of the Court stenographer, may be offered in evidence at the new trial of this cause by either side with the same effect as if said witness were actually on the witness stand in court duly sworn and testifying, subject only to objections as to the relevancy or materiality of said questions or answers; and

Further stipulated that any of the documents, letters or other papers contained in or constituting the file of correspondence kept by said G. R. Berryman in his capacity as superintendent of construction of the Federal Court and Post Office Building, San Juan, Porto Rico, which said file was produced at the former trial, returned to said Berryman and is now in the custody of the Custodian of said building, may be offered in evidence by either side subject only to objections as to the materiality or relevancy of the contents thereof. Dated San Juan, Porto Rico, May 13, 1916.

(Signed) FRANCIS E. NEAGLE,
Attorney for Plaintiff.
FRANCIS H. DEXTER,
Attorney for Defendant.

The Court: That stipulation will be noted in the record.

Mr. Paine: Gentlemen of the jury, I am reading from
190 the testimony of Mr. G. R. Berryman given at the former trial, who was Superintendent of the Government in charge of the work.

G. R. BERRYMAN, being called as a witness in behalf of the plaintiff, was duly sworn and testified as follows:

Direct examination.

By Mr. Paine:

My name is A. G. R. Berryman; my residence is San Juan, P. R. I am Superintendent of Construction for the Federal Government. I come from the architectural branch. I have been in this line of work about ten years. I hold the official position as Government Superintendent of Construction. I am at present Superintendent of the Government Building in San Juan.

I came to Porto Rico on the 25th of January, 1912, when I came down to take this position; my appointment dated the 15th. At that time on the Federal Building granite work was almost as high as it is now. It was finished practically except—that is the walls are except on the south side, which was either one or two courses down, and the buttresses and steps and terrace walls on the side.

The Court:

Q. Do you know the condition of the foundation footings when you arrived here?

A. I don't know whether they had settled because I didn't know *that* the original height was. I ascertained that later, they have settled now.

Q. Now after March 9, 1912, up to the present time, have conditions been such that it was possible for the Guerini Stone Company to continue on their work under the contract?

Mr. Wait: Up to the present time, that is, up to the time of the trial which was in November, 1912, I object to it on the ground that on May 22, 1912, this plaintiff terminated, rescinded and cancelled its contract. Its rights and the defendant's liability to it can-
191 not extend beyond that date. That whatever rights either I, the defendant, or the plaintiff had at time accured when the contract was absolutely terminated, cancelled and rescinded, and therefore any evidence after that should be excluded.

The Court: What about that, Mr. Paine?

Mr. Paine: One of the plaintiff's theories of the case is of course this, the failure of the defendant to provide proper foundations so that the plaintiff could go ahead with its work, preventing the plaintiff from completing its work under the contract within the contract time. Now the condition arises in March when the foundations sink. We see that the result of that is to absolutely prohibit our finishing our work within the contract time. It is perhaps in the nature of an anticipatory breach.

Mr. Wait: I don't think counsel ought to be permitted to say that to this jury because there is not a particle of evidence in this case on it.

The Court: Gentlemen of the jury, you may step out for a few minutes.

Argument by counsel.

The Court: The objection is sustained. The point so far as this complainant is concerned, is, what was the condition at the time he threw up the contract? What happened afterwards I do not think has anything to do with this case.

The Court: No, sir; I think the time governing in this case was May 22d, or whatever it was. The rest would simply be collateral. It would not be the best evidence.

The Court: I do not think the opinion changes the situation. The Supreme Court is discussing the evidence that was in the case, however it got there, I do not know, and it was perfectly right in going upon what was before it. I think my ruling is right. To show how far it goes in my mind, let me say this. This of course does not occur, but to show the way my mind runs. You
192 broke this contract on the 22d of May, was it, that is, you said it was broken.

Mr. Paine: Yes, sir.

The Court: Now my idea is that the condition right then is important. There may have been an earthquake two days later, but it would not make any difference what occurred after that date.

Mr. Paine: My idea is to show that we were right then. I think your Honor is entirely right there.

The Court: To ascertain the condition six months later in order to throw back light, I do not think it material. * * *

The Court: I will adhere to the ruling.

Mr. Paine: Note an exception. This may require my going through the testimony to pick out a question which will meet your Honor's ruling.

A recess of Court of ten minutes is taken after which time the jury is brought back to the box.

Mr. Paine: Your Honor, simply to make the record, I will now put a question which will be susceptible to the same objection.

Mr. Paine, Page 84:

Q. Now, Mr. Berryman, based on your knowledge of conditions, how long, in your opinion, will it be before the Federal Building will be completed?

Mr. Wait: Note my objection on the same grounds enumerated.
The Court: The objection is sustained.
Mr. Paine: Note an exception.

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Q. At the time that the foundations sank, how far had the building progressed in its construction?
A. Estimated about 20 or 21 per cent.
Q. State to the jury in a rough way how far up it had gone.
A. About the first floor level.

Mr. Wait: Will the Court require me to read my part of Mr. Berryman's testimony now or shall I do it on my own case?
The Court: No, sir; you may read your testimony any time you wish.

193 G. A. FOLLETT, being recalled as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Paine:

Q. Now, Mr. Follett, at the end of February, 1912, can you tell the jury the amount of concrete that had been put into the Federal Building by the Guerini Stone Company?
A. Yes, sir. (The witness refers to some papers.)
Q. Can you state that of your own knowledge?
A. Yes, sir; that is from estimates I made up and sent to Boston

of quantities. I made these estimates myself. At the end of February, 1912, I was present on the job, in San Juan. I helped make the measurements with one of the men working for me. We took a tape and measured the walls and measured the openings and took the measurements and figured out the number of cubic feet. In cubic yards it was on February 27th, 573 cubic yards. We measured the granite also and we made that 3460 square feet. Five hundred seventy-three cubic yards of concrete, makes 15,471 cubic feet, at a price of $1.07 per cubic foot gives $16,553.97 to which on this estimate we added our bill for $300.00 for reconstructing certain piers, plus 3460 square feet of granite surface at 40¢ per square foot, $1,384.00, making a total of $18,237, which is the amount of this estimate.

Q. Now, between the end of February and March 9th which was the date of this application, was any more work done by you?

A. Yes, sir; there was more concrete put in place. I did not personally make a measurement of that concrete, of the last ten days or whatever it was. I was there at the job. I have no quantity of that.

Q. From your knowledge of the amount that had been put in, can you give the jury a fair estimate of that amount?

Mr. Wait: I object to that, if the Court please. During that period they were replacing a lot of work which had been condemned by the government and that must be separated.

Mr. Paine: That does not appear in the question.

Mr. Wait: It would be a mere guess and it would depend
194 upon a lot of questions which should be shown.

The Court: The objection is overruled. That would be cross-examination.

Mr. Wait: Note an exception.

A. I estimate about 87 yards additional. This 573 cubic yards to which I have testified, does not include the yardage in the reconstructed piers. Eighty-seven cubic yards is equal to 2349 cubic feet, at $1.07 per cubic foot, $2,513.43.

Q. Now, can you tell the jury the total amount of concrete that was poured by your company on the job, in the San Juan Post Office, up to the time when you stopped work?

Mr. Wait: That I object to the form; no foundation for it. It has been shown that this witness does not know; he has only estimated it.

The objection is overruled.

Mr. Wait: I will add to that objection that this testimony is immaterial as to how much work they had done because there is no claim here of quantum meruit, none being proven, and the amount of work they had actually done up to March is not material because we have what they applied for on March 9th. The trouble between the parties is $1.07.

Mr. Paine: That is simply to show that that particular application was made on the basis of the unit that Mr. Carlin suggested.

Now, as Mr. Castro pointed out, that is not the basis of our suit, except for the indirect purpose of showing the breach of the contract. Our measure of damages is not based on $1.07 per cubic foot. That is submitted simply to prove the breach of the contract. The jury is entitled to take into account the amount of work actually performed and the amount of losses, as the Supreme Court said.

Mr. Wait: We were not to pay according to the amount of work done. We were to pay according to the applications submitted and when the conditions were satisfactory, and if he did not make any application he could not have any recovery. The contract makes it a condition precedent.

195 The Court: The objection is overruled.

Mr. Wait: Note an exception.

Mr. Wait: The question is, can you?

A. I can.

Mr. Paine:

Q. Will you tell the jury?

A. Eight hundred fifty cubic yards, or 22,950 cubic feet.

The Court: By what time was that? What was the question?

Mr. Paine: Up to the time they stopped work. That is the amount of cubic yards of concrete poured by the company up to the time they stopped work.

The Court: And that time was May 22d?

Mr. Paine: No, they stopped work on March 9th. May 22d, was the notice.

Q. That is about 25% of the total amount to be poured under our contract.

Q. Now, Mr. Follett, were you in charge of the disbursements and expenditures of the Guerini Stone Co. in Porto Rico?

A. Yes, sir. I kept the books and accounts of the plaintiff company in Porto Rico. I kept the payroll account. I took vouchers when we bought material or paid bills. I kept the payroll account correctly and took correct vouchers. At the time I made the payroll and at the time I took the vouchers, I knew they were correct. I have those vouchers and checks here.

Q. Taking the information from those checks and vouchers have you made a memorandum of the sum totals under various itemized headings, showing the amounts of the payrolls and expenditures?

A. Yes, sir. At the time I made this memorandum, I knew that the figures were correct. I made them myself. We bought materials from Finlay, Waymouth & Lee for use on the job. Those materials were used on the job.

Q. Were they, in your opinion, reasonably necessary for use on the job?

Mr. Wait: I object to that. That is for the jury to determine.

Mr. Wait: Note an exception.

A. They were.

196 Q. What did you pay Finlay, Waymouth & Lee for those materials?

A. I paid them $2,616.06. We bought materials which were used on our job on the building from Sproul. They were actually used on the building.

Q. In your opinion, were they reasonably necessary for the work on the building?

A. Yes, sir; they were.

Mr. Wait: The same objection and an exception.

Q. Will you state the amount?

A. I paid Sproul $674.42. We bought things from Portilla for use on the building. Some of it was labor, in connection with material that was used on the building. Some things that they had to make for us out of iron and steel, in which they included their labor. The cost of material including the cost of labor. I paid them $189.49. I have the vouchers; for all these items. (The witness produces some papers.) Do you want them?

Q. I want you to have them there where you can refer to them.

A. We purchased things from Korber & Company, which were for use on the building. It was equipment; and was actually used on the building.

Q. In your opinion, was it reasonably necessary to use on the building?

A. Yes, sir.

Mr. Wait: The same objection and an exception.

A. The amount which I paid was $175.25. We bought things from Abarca which were used on the building.

Q. In your opinion was that necessary to use on building?

A. Yes, sir.

Mr. Wait: The same objection and an exception.

A. The amount was $106.47. The total amount I have just given, covering lumber, hardware, blacksmithing, etc., was $3,762.69. I have vouchers and receipts for that total amount here. We bought stone for concrete construction on the building. It was actually used on the building.

Q. In your opinion, was it reasonably necessary to use on the building?

Mr. Wait: The same objection and an exception.

A. It was. I have the vouchers for those payments here. They amount to $1,960.87. We paid the Porto Rico Railway,
197 Light & Power Company for wiring, power, rent of motors, etc.

Q. Was that used on the building?

Mr. Wait: I object to that. Power and light could not be used on the building,

The Court: The objection is overruled.
Mr. Wait: Note an exception.

A. We rented some electric motors from this company to run some of this machinery, and the installation of the wiring and the motors had to be paid for, and the current that these motors consumed while they were working, and also a few lights were installed in the sheds where a few of our men lived. I have vouchers showing the total amount of that payment. The total amount is $433.25. We bought cement and plaster which was actually used on the building. It was bought from Fritze, Lundt & Company.

Q. Was that cement and plaster, in your opinion, reasonably necessary for use on the building?

Mr. Wait: The same objection and an exception.

A. It was necessary. I have the vouchers here showing the amount I paid. I paid Fritze, Lundt & Company, $2,843,05. We bought oil from the West India Oil Company, and used it on the work.

Q. In your opinion, was it reasonably necessary?

Mr. Wait: The same objection and an exception.

A. Yes, sir. The amount was $19.20. I paid freight and express bills here in San Juan. Those freight and express charges were on materials which were used on the building. The machinery and materials were used on the building.

Q. Were they, in your opinion, reasonably necessary for use on the building?

Mr. Wait: Note the same objection and an exception.

A. They were. I paid for freight and express bills $123.06. I have miscellaneous expenses for which I have vouchers and I have miscellaneous expenses for which I did not have vouchers. I have miscellaneous bills $306.69 for which I have vouchers. I paid passenger fares at San Juan. They were workmen in connection with this contract of ours at this building. They actually
198 worked on the building. They did, yes, sir.

Q. In your opinion, was their work reasonably necessary in connection with your job on the building?

Mr. Wait: The same objection and an exception.

A. Yes, sir.

Q. In your opinion, was the amount paid to them as wages reasonable?

Mr. Wait: The same objection and an exception.

A. Yes, sir. I paid for passenger fares $830.00. We had miscellaneous cash payments for board of certain men, ice, medical services, postage office supplies, etc., which were not charged anywhere else. The amount of that was $416.59. I paid for sand by the

load weekly and know how much we paid for it. The sand was used in the building.

Q. In your opinion, was it reasonably necessary for use in the building?

Mr. Wait: The same objection and an exception.

A. It was. I paid for sand $407.96. I paid for my board and room from February, 1911, to December, 1911. I did actually use the board and occupy the room.

Q. In your opinion, was that reasonably necessary in connection with your work on the job?

Mr. Wait: The same objection and an exception.

A. Yes, sir. In my opinion the amount paid for board and room was reasonable. The amount paid was $678.40. That was from February, 1911, to December 1911. I got paid for my work on the job. I was actually paid.

Q. In your opinion, was the amount that you received reasonable?

A. Yes, sir. I received $2,080.00.

Q. Now, will you explain to the jury the way that you kept your payroll down here?

A. I had an account book in which I wrote the name of each man on the left-hand side of the page and then the page was ruled vertically into columns one for each day of the week and I put down in the column for any one day the number of hours that each man worked that day. That made six columns for the week excepting Sunday, and those hours were added together for
199 the total for the week and multiplied by the rate at which the man was paid for the total pay he was to receive that week. I have the account book; the original payroll. All those laborers were actually employed on the job in San Juan.

Q. And in your opinion was the rate of pay paid to them for their work, reasonable?

Mr. Wait: The same objection and an exception.

A. It was.

Q. And in your opinion was it reasonably necessary to employ those laborers to do the work and under the conditions under which you were struggling?

Mr. Wait: The same objection and an exception.

A. It was. The amount paid by me for labor at San Juan, in addition to my pay, was $11,879.21.

Q. Now, can you give to the jury the total of the amounts you have just testified to that was actually paid out in cash in San Juan?

A. I actually paid out $25,303.22.

Q. Now, I ask you again, in your opinion, were the materials purchased and the labor provided reasonably necessary for your work on the Post Office Building? Were the prices paid reasonable?

Mr. Wait: I object, if the Court please, that it is for the jury to determine. It is not a question for the witness, he is not qualified, and on the further ground that it is immaterial and not the proper measure of damages, and I make this objection apply to all that data, as I did when Mr. Converse gave it, as not being the proper measure of damages.

The Court: The objection cannot date back. It will be good for the present question.

Mr. Wait: I make it at this time.

Mr. Paine: The only purpose of asking that question, if it is conceded that the question of reasonableness of the payments is for the jury, it seems to me it is only proper to have the testimony of the witness who is before us as to whether they were reasonable.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. They were.

200 Q. Now, have you credited any amounts of money to the P. J. Carlin Construction Company besides the amounts which Mr. Converse has already testified were credited to him in New York?

A. I credited or sent a credit in for a shed which we had erected here at the building sold to the Carlin Company, $65.00.

Q. Did you give them any other credits?

A. We did some ornamental stone work for one or two people around the city here, for which we received $778.50, which they were credited with. And just before I left here I sold certain lumber for $243.01, which is credited to their account.

Mr. Wait: Have you the total amount of the credits?

Mr. Paine: The total credits to you, including these payments, are $5,526.06.

Q. Now, Mr. Follett, after you finished your work down here, did the Guerini Stone Company have any materials, machinery or tools left on hand?

Mr. Wait: I object to that as immaterial and not within the pleadings.

Mr. Paine: I will show you a case where it says that the rule is that the plaintiff's expenditure minus any materials which he may have on hand and plus any profits which he might have made.

Mr. Wait: If he is merely showing it to give a credit to the defendants, I will not object to it, but if the purpose is to charge the defendants with this plant and materials, then I object to it as not being pleaded and not being within the pleadings.

Mr. Paine: I want to show what became of it so that it cannot be credited to us.

Mr. Wait: Then I object to it because failure to credit it or to account for it would be to charge us with it, and not having been pleaded and there being nothing in the pleadings whatever about this material, it cannot be charged to the defendants.

201 Mr. Paine: I propose to show that the defendant took it and has it.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. They did. I am familiar with what comprised those tools and machinery.

Q. What became of them?

Mr. Wait: If he knows of his own knowledge.

A. I know how they left our possession. I don't know where they are now. They left our possession by order of the Court.

Q. Who got them?

Mr. Wait: I object to that. The act of the Court and the order of the Court are the best evidence. We don't want this witness to construe an order of the Court.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. The tools remained here on the building site and were used by some other persons after us.

Q. I show you a document entitled: Inventory of property taken over by P. J. Carlin Construction Company from Guerini Stone Company, San Juan, Porto Rico, August 3, 1912, signed The P. J. Carlin Construction Company by John J. Carlin Vice-President, and ask you to examine the items stated on that inventory and tell the jury whether at the time you left Porto Rico you were familiar with the articles contained in the inventory.

Mr. Wait: That is, for him to verify or check it. I object to the form of the question and as being misleading to the jury. Being familiar with it isn't anything.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. These items all look familar to me; yes, sir. We had those articles here.

Q. Are the items contained in this inventory, articles that were used while you were in Porto Rico in connection with the
202 work on the Post Office Building at San Juan?

A. Yes, sir; they were.

Q. Did you see these articles when you were here?

A. I did; yes, sir. I am familiar with the nature of the articles. I know what they were used for. I have purchased similar articles.

Q. Do you know what you paid for similar articles?

A. Some of the bills are here.

Mr. Wait:

Q. You bought them, didn't you? You purchased those very articles, didn't you?

A. Yes, sir.

Mr. Paine:

Q. Do you know the fair and reasonable value of those materials in San Juan in June, 1912?

A. I made my value at that time $3500. As far as I know, these articles were not returned to the Guerini Stone Company.

Mr. Wait: I would like to renew my objection and move to strike out that price of $3500.00 on the same ground, that it is not within the pleadings and it is not material as far as the measure of damages is concerned.

The Court: The motion is refused.

Mr. Wait: Note an exception.

Q. After August 6, 1912, do you know whether the value of these tools and materials was charged by the Guerini Stone Company to the P. J. Carlin Construction Company?

Mr. Wait: Objected to as immaterial.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. They were.

Q. And is there included as part of these materials the machinery, etc., which Mr. Converse testified were rented to the Guerini Stone Company by H. P. Converse & Company at the rate of fifteen dollars per day?

Mr. Wait: Objected to as immaterial.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. I don't understand.

Q. Is it included in this list?

Mr. Wait: The same objection and an exception.

A. They were part of the tools in that list at the rental price.

203 Q. Were those tools included in this inventory?

Mr. Wait: The same objection and an exception.

A. Yes, sir.

Mr. Paine: We have gone with much more detail in this trial into the items of damage. The evidence at the former trial showed that total to be $45,693.32. The evidence which has been produced at this trial changes that total slightly. It is $45,617.09, which is some forty or fifty dollars less, and I now move to amend the ad-damnum clause in the complaint to correspond to the proof which has been introduced.

Mr. Wait: No objection.

The Court: The amendment will be allowed.

Cross-examination.

By Mr. Wait:

Q. Mr. Follett, were these applications, which I suppose you are familiar with, figured up and estimated here at San Juan?

A. The applications for payment, I estimated or figured the quantities and sent them to Boston; I didn't figure the prices.

Q. Didn't you take the quantities from Mr. Stierle and Mr. Berryman?

A. Not on what I sent to Boston; no, sir.

Q. Did you compare them before you sent them to Boston with Mr. Stierle's quantities?

A. No, sir; that is why I am short on my estimates.

Q. I think you said that between February 27th and March 9th you did not estimate the concrete laid.

A. I did not measure it up and figure it by feet and inches as I did the amount previously.

Q. You estimated it by the progress that had been made and determined it by the amount of time that had been given to it in proportion to the ratio that had been done before, didn't you?

A. No, I don't think I would do it that way. Instead of actually putting the tape on the concrete each day, I estimated the height and length of it by eye. It was merely an estimate.

Q. I don't know whether it was you or Mr. Converse who said that there was no concrete laid after March 9th.

204 A. I don't know who testified to that. I don't remember that I did. There was no concrete placed after March 9th by the Guerini Company.

Q. You practically shut down and all you did after March 9th was to clean up and gather your tools together, wasn't it?

A. Yes, sir; we stopped work at that time.

Q. Now, you gave us your estimate that after February 28th you did 87 yards between February 27th and March 9th didn't you?

A. I estimated it at that; yes, sir; and 573 and 87 make 660 cubic yards. Up to March 9th, we had laid 660 cubic yards, according to my measures and estimates.

Q. Where did you get your 850 that you said was laid together?

A. I got that from the government's measurements, and from the amount that I heard Mr. Carlin admit we had placed.

Q. Then it was not on your own knowledge at all, but it was hearsay.

A. There was evidently a mistake in my estimate.

Q. It was on hearsay evidence, wasn't it? Answer the question.

A. Yes, to that extent.

Q. When you said that you knew what amount was laid 850 cubic yards you were taking somebody else's word *of* it, weren't you?

A. Yes, I was taking somebody else's word for that.

Q. Then you did not know of your own knowledge, did you?

A. Not at that time.

Q. You don't know now, do you?

A. I know that that amount was put in there.
Q. How do you know except from hearsay?
A. It was paid for.
Q. How do you know except from hearsay that it was 850?
A. What is hearsay? When somebody else tells you?
Q. Yes.
A. That is true.
Q. Don't you know that hearsay evidence is not admissible in Court?
A. No, I don't know it.

Mr. Paine: When it comes down to what the defendant's Vice President admits, it is not hearsay.

205 A. Taking 850 cubic yards as correct, approximately 25% of the work had been done by the Guerini Stone Company.
Q. And to do that twenty-five per cent you had spent here in San Juan over $25,000, hadn't you?
A. Yes, sir.
Q. Then for the whole of it you would have spent $100,000, would you at that same rate?
A. That is one of the suppositions.
Q. At the same rate you would have spent that amount, wouldn't you?
A. Part of that $25,000.00 would not be repeated, being plant; and being passages for people that would not be required to be sent down again.
Q. Anyway, to do a quarter of the work you had spent $25,000.00 and for that work that you have done, if you had done it to the satisfaction of the supervising architect and the defendants, you would be entitled to one-fourth of $64,000.00 is that right? How much would you be entitled to; one-fourth of what?
A. We would be entitled to 85 per cent of one-fourth. That would be even less than $16,000.00. If you suppose $16,000.00 is correct. Our contract was for $64,750.00. Approximately it would be $16,000.00 less fifteen per cent. Plus the setting of the granite.
Q. Have you figured the setting of the granite in here?
A. That is not included in the twenty-five per cent of the work done; no sir, but this setting of the granite is included in the $25,000.00. It is a very small amount; the final amount being 3600 feet at forty cents. We figured that it was 3460 square feet at 40¢ which amounts to $1384.00. That was all the setting of the granite amounted to, as far as our being paid for it. That is a small proportion of $25,000.00
Q. And I think you showed the profits as being something like $9,000.00, when on doing a quarter of the work you had lost $9,000.00; is that right?
A. I can't tell you anything about profits; no, sir.
Q. When you were about to close up and go to New York do you remember, on May 31st, offering this plant to the defendant for $2334?

A. A part of the plant, not all of it. My recollection is that we only offered a part of this plant for $2334.

Q. It was the greater part of it; wasn't it?

206 A. No, they had no concrete mixer and they wanted to get ours and I think they offered to purchase it and also offered to rent it. They didn't do either finally.

Q. Do you remember on May 31st having a conversation with Mr. Oaksmith in which you told him that he could have the whole plant and all of it for $2334.00? Do you say you did not have such a conversation?

A. I don't recall it; no, sir.

Q. Would you say that you did?

A. I would say I did not give him that figure. It doesn't look reasonable to me.

Q. Do you remember writing a letter and offering the plant to the defendant for $2334.00, provided it was accepted before a certain time?

A. No, sir.

Mr. Wait: That is all.

Redirect examination.

By Mr. Paine:

Q. Have you any explanation to make to the jury as to why it cost you $25,000 to do a quarter of the work?

Mr. Wait: I object to that. It is purely a question for the jury. I haven't said anything in my cross-examination to bring out anything of that kind as to the cost. I have merely taken his figures that he gave. He said he didn't know anything about the profits.

Mr. Paine: The object of this cross-examination was to attempt to convey the idea that if it cost $25,000 to do a quarter of our contract, that it necessarily would have cost us under proper conditions more than the amount of our contract to do the work. I think I am entitled to bring out that it was because of the conditions that we complained of, that it cost us more than it should have.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. We had to do our work at such times as we could on account of the condition of the building as furnished to us ready for our contract work. On work of this kind——

Mr. Wait: I object to that, if the Court please, going into any academic question of work of this kind.

A Juror: I would like to have a point cleared.

207 Q. I understood the witness to say that he measured the concrete work done on the grounds.

A. I did; I helped measure it.

Q. I heard the witness mention some figure around 669 cubic yards.

A. I got that by addition of the 573 yards that I had measured as done to the end of February, plus the 87 yards that I estimated by eye that had been done from that time until the work was stopped. Our estimates proved correct but the arithmetic was wrong, we had made a mistake in multiplying it out.

Q. Then he admits that his estimate is wrong?

Mr. Paine: Is low.

Mr. Wait:

Q. You never measured the work completed after March 9th?
A. I never measured it complete after the end of February.

Mr. Wait: That is all.

Witness withdraws.

Mr. Paine: The plaintiff rests.

The Court: What says the defendant?

Mr. Wait: If the Court please, defendant moves to dismiss the complaint in this action or the several causes of action on the ground; first, there is a failure to prove any of the allegations in the complaint necessary to a verdict. Second, that plaintiff has failed to make a case. Third, that no damages have been proven. Fourth, that the measure of damages attempted to be proven is not the measure of damages to which plaintiff is entitled. And fifth, that no breach of the contract can be founded on the evidence adduced, under the contract between the parties.

Now as the United States Supreme Court has said, this is an action for breach of contract, and, in the practice which I am most familiar with, it would be divided into three causes of action. The first cause of action as amended is that thereafter—I don't suppose I need read it for the record—but it is prefaced upon defendant's failure
208 to provide the granite blocks necessary therefor and also owing to defendant's failure to properly construct and to complete the foundations of said building and to supply work, labor and materials not included in the contract between these parties and which it was obligated to supply.

With the Court's permission, I will take up this first cause of action first, but only with respect to the granite setting because the other grounds are prefaced in the other causes of action.

Now as Mr. Converse has said in his testimony, the granite setting was not in the original contract until the option was exercised by the defendant to have the plaintiff do it. That he says, and I think the testimony already shows, was September 15th. It is shown that he knew at that time the conditions and the situation here at San Juan and of the work. The contract for the granite setting then did not become a part of his contract until September 13th or 15th, 1911, and without any objections, without any intimation to the defendants that we were guilty of any breach of contract or that he had suffered any damages by reason of anything pertaining to the granite work, there was not a word.

I maintain and hold, therefore, that no damages whatever could be assessed or considered in this first cause of action up to October 13, 1911, when they became a part of the contract. And that if thereafter there were any damages whatever, and none have been shown, or anything upon which to preface a breach, that they were waived by the plaintiff's taking this granite and setting it without any complaint or any notice that he would consider what had gone before as any cause for a breach of contract or for a termination of the contract or for any damages.

The testimony shows by Mr. Converse, I showed by him and by Mr. Follett, that on October 13th or 15th, 1911, there were at least two or three cargoes of granite here remaining to be set. Mr. Follett in his testimony said after they started setting granite on October 13th, "things went along very well,"—those were his words as near as I can quote them—everything after that "went along rapidly and very well." Therefore, there cannot be any breach prefaced
209 on the setting of the granite on the first cause of action.

Likewise in the second cause of action, which was between October 15th and March 9th, there can be no preface of breach of contract or any damages claimed by reason of the setting of the granite because "the work went quite steadily and quite rapidly along," as Mr. Follett said.

By March 9th, according to the testimony of Mr. Converse he had had a conversation with Mr. Joe Carlin in which he said he did not want to do the granite work any more and something to the effect that Mr. Carlin assented. Therefore the granite work was wiped out of the contract at that time and could no longer constitute any cause for a breach or for any damages.

Now the second cause of action, paragraph six recites substantially the same as the amendment or new matter to paragraph five, giving the substance of the contract clause, and says during the period from October 16, 1911, to the 9th day of March 1912, the work under the contract was unreasonably and unjustifiably delayed by the inexcusable default and failure of this defendant to provide necessary materials and to carry on its part of the construction work of said building, which is in part the language of the contract and the covenant made by the defendant that if he did not provide labor and materials and his failure prevented the plaintiff from proceeding, that he would reimburse any losses and expenses.

Now, the next cause of action the third cause of action, paragraph seven, likewise says, "owing to the inexcusable fault and failure of the defendant to properly carry on its part of the contract, and owing to the inexcusable fault and failure of this defendant to properly construct the foundations and other works in its charge and to furnish and provide the necessary materials, all work of every nature was stopped on said building."

My point with respect to all three causes of action, which are prefaced upon paragraph 11 of the contract which recites: "The general contractors will provide all labor and materials not
210 included in this contract in such manner as not to delay the material progress of the work, and in the event of failure to

do so, thereby causing loss to the sub-contractor, agree that they will reimburse the sub-contractor for such loss."

Now, my point is, I maintain that the contract anticipated delays by the general contractor, and provided a means and a measure to reimburse the sub-contractor for any delays that took place, such as the failure to provide materials and labor, and the United States Supreme Court has extended that phrase or clause, as it would seem, in its opinion, to the failure to provide foundations for the work.

The parties have made provision in this contract for delays. They have rendered it entirely proper, entirely within the province of either party, to delay this work and they have stated and recited a measure by which any damages that accrued should be and shall be measured. That clause in the contract is a protection to the owner, to the contractor from this very kind of actions and suits and is a provision which the Court may not take away from the parties.

If that be true and the parties anticipated delay and made provision for it and established a measure by which recompense and damages could be made and had, then any act of the defendants which delayed this work could not be a breach of the contract and could not be an act which would warrant the termination or rescission of the contract, because the parties have specifically provided for delays and anticipated them and provided a means and a measure by which they should measure the damages.

If this general contractor has failed to furnish any labor or materials, or the foundations that the Supreme Court embodies in it, then that act on its part was entirely within the contract within the general contractor's rights and province under its terms, and could not be considered by the Court to be a breach of its contract. If it was not a breach of its contract, it cannot be made a reason or a cause for the termination of the contract by the other party.

To my mind, as I regard this, it was a fatal and most un-
211 fortunate step for the plaintiff to have rescinded, terminated and cancelled this contract. He took right away from himself when he did that the provisions of the contract granting and giving to him recompense for his losses and damages. If the defendants have done nothing but fail to furnish labor and materials, it is not a breach of the contract, as I say, because it is embodied in the contract and provided for. Now, we will apply that argument to all three of these causes of action.

My next point is that any delay under the first cause of action was condoned and waived by reason of the plaintiff proceeding with his work October 13th or 16th without any notice to the defendant of any breach on its part up to that time, by making proposals for additional work, including the setting of the granite, the brick work and the placing of the structural steel, and by accepting, without any notice of breach or of any intention of claiming any breach, the contract to set the granite under the option exercised by the defendants under their contract. That that is so, is conclusively shown by the fact that the plaintiff wrote to the defendant no less than four letters after we elected to have him set the granite, requesting and insisting that we should state the date of the commencement of

his work under his contract. Finally, on September 15th we wrote him a letter to proceed with your work under your contract.

Unquestionably, those letters, extending between July, 1911 and September 15, 1911 show that the plaintiff had no idea whatever that it had any cause to breach any cause for complaint, or had any cause for any complaint whatever with these defendants, and that he was seeking to have the date of his commencement postponed to the date when it was given, September 15, 1911, so that he could have his 300 days in which to complete, continue from that point, and that act on his part, the writing of those successive letters and finally receiving a letter to progress under his contract, and his act of proceeding under the contract are the acts of the parties themselves and the construction of their contract, and the plaintiff is irrevocably precluded from ever taking any different position, having led the defendants to believe that he was
212 proceeding with his work as of and from that date and that his three hundred days should continue from that date; a construction placed upon the contract by the parties themselves.

Defendant moves for a dismissal of the complaint on the following grounds, viz: That there is no adequate proof or evidence that the delay was caused by the defendants. I have searched throughout my notes made of this record and I cannot find a single particle of evidence that these defendants contributed in any way to the delay of this work. There are allusions to it in letters read. It was attempted several times to get the witness to say that the work was delayed, but I cannot put my finger on, (and I challenge my opponent to), one scintilla of evidence bringing to the defendants the responsibility for any delay in this case.

The trial at the former term did not contain any more evidence of delay than it does this time either, although the doors were wide open and everything was admitted. The only preface or ground upon which any delay could have been shown either as to the period of delay or as to when the delay was, or any of the factors that go to make up the delay on which damages can be prefaced, were wanting.

I maintain, if the Court please, that it was the duty of this plaintiff to show that between one certain date and another certain date no work could be done because a certain specific article or thing was not here or was not done; that certain labor that was to be performed had not been done at that particular spot for that particular period of a week or two weeks, or that certain materials had not been delivered or the work done.

There is not one scintilla of evidence in here that can be placed or that will locate the delay, where it was or for what period of time or for what necessity or what want of labor or what want of material caused it. Now, no damages can be assessed for delay as delay, and no breach or termination of a contract can be placed either by the Court or by the jury, unless the period of delay or the cause of it is presented to the Court so that the Court may judge

213 whether or not that was within the contract, whether it was within the province of the defendant, or the delay was inexcusable or whether or not any damage flowed from it.

We have merely shoveled in here, a mass of letters, etc., which are not material and which the Court has ruled should be read out and that cannot be considered by the jury to draw an inference of delay. It seems to me we cannot go to the jury on such evidence.

Second. There is no adequate proof or evidence that will enable the jury to separate and distinguish the delays caused to the plaintiff from the total and entire period of delay. Now, I have shown, and I think, conclusively, right from the mouths of these two witnesses that there were delays caused by the plaintiff. That they made errors in setting the granite too low and out of line. That they erected piers twelve or fourteen of them, wrongly so that they had to be torn down. That they were delinquent in requiring us, under the terms of the contract, to furnish two guy derricks, when there is not a word said in the contract as to guy derricks and we had two stiff legged derricks here, as has been shown, and that they were built over into guy derricks at great expense. That we had to wait and were delayed to get guys from the States because they could not be had here. That when we had one engine installed, they insisted that we must furnish two engines, and all these things contributed to the delay, and I have shown those specific instances of things done, errors made, which caused delay which my friend has not. I have given them by their dates and I am ready to show the time over which those delays caused by this plaintiff extended. Of course, that is a matter which would go to the jury, but the jury must have something by which it may distinguish the delays of the plaintiff from those of the defendant, and there is not anything in the case to do that.

Third. There is no adequate proof or evidence that will distinguish the delays caused by the errors of the plaintiff from all the errors, and for which errors the defendant may have been liable under the terms of the contract, if he is indeed liable at all,
214 and for which he cannot be held liable I maintain under the general breach, unless the error was so flagrant as to constitute a breach; in other words as to show bad faith, as the Supreme Court says, and was so flagrant, that it could not be overcome.

Fourth. That there is no evidence or proof that enables the jury to proportion or determine the damage suffered for the several periods declared upon in the complaint or how much of the expense or cost was due to the delays caused by the plaintiff itself or by other agencies or persons, including the government. Now, I appreciate the decision of the United States Supreme Court that if some act of the government prevented the defendant from furnishing labor and materials, that under the contract, which is dead, broken, out of the case the defendant might be liable for damages suffered by the plaintiff. The damages shown constitute lump sums of money disbursed and those lump sums which have been put in here and the measure of which I am going to attack later, cannot be apportioned to the different periods. Now, here are three causes of

action and I feel I don't know the practice here because I am not familiar with it, but in most jurisdictions I have a right to ask the Court to direct the jury to determine and state how much damages they find under the first cause of action, how much under the second cause of action and how much under the third cause of action, because the three causes of action are specifically set forth in the complaint. The jury cannot do that. There is not anything whatever to show in this case how much of this money was dispensed between February, 1911 and October 15, 1911. There isn't anything whatever to show in the presentation of this case how much money was dispensed or what measure of damages was suffered or in any way what damages were suffered during the second cause of action and there is nothing whatever to show as to the third cause of action.

I cannot meet such proof under such a case as has been made here in three causes of action. There is nothing whatever in the evidence connecting these damages with periods of delay, or with particular parts of the work, or with the parties, or with the
215 case, nor for the periods covered in the three causes of action.

No periods of delay have been shown whatever. No evidence has been introduced by which any losses or damages can be assessed or determined for any period of delay or for any other condition. No attempt was made to do so.

The case has not been tried on that theory but it has been tried on the theory of all losses or none. And we come to the point right here that there cannot be any recovery in this case unless the plaintiffs were absolutely justified in cancelling and terminating and rescinding the contract.

Now, another ground of default and upon which it has been sought to place this breach and this termination of the contract, is that of failure to make payments. Now, I call the attention of the Court to the contract clause which makes it a condition precedent to any payment, that the sub-contractor should submit an application, or a requisition it calls it here on a form to be supplied by the general contractors not less than twelve days before payment is desired. Now, no application whatever for a payment in this case was made in that manner until December 30, 1911. So there certainly cannot be any complaint with respect to the defendants and their conduct as to the payments up to that time. An application for a payment was made at that time, which I think your Honor will agree was not under the terms of the contract, and which there was no ground whatever for.

I asked Mr. Converse on the stand and read to him extracts from no less than six or seven letters, in every one of which he demanded payment under his contract. I asked him if he wanted anything or expected or demanded anything except what was due him under his contract, and he said no. I further showed that if he had been paid the price of $1.07 a cubic foot, that he would have received about $100,000.00 or more, when his contract price was only $64,000.00. I further showed by him that the engineer-in-charge of the work at that time had made a mistake and had overpaid for this basement work the Carlin Construction Company. Whether the amount was stated, I don't know, but it was some eight or nine thousand

216 dollars that they had been overpaid. This $1.07 was not correct. It was a mistake. Certainly, under the terms of the contract he could not expect any payments of any such sum when his applications were made for payments at that price. They were refused and he was not paid any payment in accordance with that application.

But, I go further and show to the Court something that the United States Supreme Court overlooked. There is a condition precedent in this contract, that no payments shall be made except for such work as is "done to the satisfaction of the defendant and the architect," and they had a perfect right to withhold their money until their satisfaction had been declared and they were satisfied. Not one word of this and not one single element of proof of satisfaction here. I don't know but I could have objected to it because it was a condition precedent. If they wanted to show why we were not satisfied, they must have pleaded it. Therefore they were never entitled to any payments.

Going still further and taking up the United States Supreme Court decision, they have got in this case identically the proof that they put in the other case and the Court said that they could not award any damages and they could not consider it a breach of contract, that they must go further and they have not gone further.

The failure to make progress payments here is no breach of the contract which would warrant the other side in rescinding and cancelling the contract. I can give to the Court any number of authorities on that line. Failure to make progress payments is not such a breach of contract as allows recovery of prospective profits. 140 N. Y. 287 at 297; 42 Hun. 45; Jones v. State of New York, 57 App. Div. 403; 47 App. Div. 49; 164 App. Div. 128, a case which I tried myself for the Mechanics Bank of Brooklyn and on this very same point and got defeated; and many other cases which I have here. 115 U. S. 188 and an Ill. case.

Now, we go still further with respect to this matter of partial payments. I call the attention of the Court that these partial payments are ad liminum of the work. Because he did not get a progress
217 payment between December 30th and March 9th, when he made his second application, he rescinds the contract on May 22d. He did not start this work until October 15th, and he was paid every cent for the work he did at the pro rata price of his contract, and notwithstanding Mr. Converse's refusal to admit it, there is no question and I can prove it absolutely, that the common ordinary concrete down in this basement on the basement walls and piers, excluding the reinforcement which we furnished, does not cost one-third of what this artificial stone work does, and that was the reason why Mr. Berryman under the Supervising Architect reduced our estimate $8,000 or $9,000. It was because Mr. Stierle had allowed us at the uniform rate of $1.07 for the whole building and Mr. Berryman and the Supervising Architect insisted that the work in the basement was so cheap and so much less value and cost that they would not allow such a price as $1.07 on that work, and he reduced it to thirty-five and fifty cents. I don't want to make this in any way on

the facts, but we shall prove absolutely that we paid Mr. Converse all that was due him. But let us take it for granted we did not and I will argue from that point.

Now, another thing; the plaintiff cannot recover anything in this case as presented by reason of withholding the monthly payments because the measure of damages for the withholding of payments is not the prospective profits. The measure of damages, as a fundamental principle of law which I learned as a law student, is the interest on the money withheld, and no other damages can be had for that. Damages assessed in the manner in which they have been presented here for the withholding of moneys would ruin any man who might withhold a small sum of money and be taxed millions of dollars damages. The Court cannot concede any question of that kind, that the withholding of a small amount of money even of ten or eleven thousand dollars, which they claim, should mulct this defendant in forty-five thousand dollars. It seems to me that this proposition for measure of damages for breach of contract in not making monthly payments is something which we could not allow to creep into our jurisprudence, and it is contrary to all the decisions.

218 Now we come to another very serious situation in this case the way it has been presented, and I don't do this to reflect upon my friend. I think he has done well. I think it is the case that is the trouble. If this case be allowed to go to the jury on proof submitted, it must be submitted and the jury must be required to find whether the plaintiff, if he was justified at all in rescinding or terminating the contract, was justified by reason of the wrongful withholding of the money, or was he or it justified in doing it by reason of the first cause of action or the second cause of action or the third cause of action. If the jury seek to justify or the Court—it might be a mixed question for the Court and the jury—if the Court or the jury determines that it was on account of the wrongful withholding of payments, then I shall certainly insist, and, if necessary, cite any number of authorities that the case must be dismissed, because no such measure of damages has been proven.

The Court will appreciate there were but two applications made here in the manner required by the contract, one on December 30th on which some money was paid, and the other one on March 9th. Now, in each of those demands for money if we may call them so, and I am willing to, the demand was for $1.07 a cubic foot instead of pro rata or instead of any contract price or any provision of our contract, and without any assertion on his part of any proof in this case that the work had been done to the satisfaction of the Supervising Architect or of the defendant.

Now, let us see very briefly what the situation was. Not that the Court can perhaps consider it in this motion, but just to see how this matter will come out. In the first place, repeated errors have been made on this work. When Mr. Berryman came down here he found that piers had been built without any reinforcement although the plans showed it and the specifications required it, and the written notes on the drawings said it must be put in. A setlement occurred

and an investigation was ordered. I think the proof goes that far in Mr. Follett's testimony.

At that time, which was February, March, April and up
219 to May 22d nobody knew what that settlement, was due to and that any reinforcement had been left out of the footings and other work that Guerini had done whether they were foundations or whether they were walls or whether they were something else, a crack might result. The Court will appreciate that the reinforcement of steel rods in concrete is what keeps it together and keeps it from cracking. Nobody could tell whether it was due to that or to something else, and I maintain that these defendants would have been exceedingly unwise to have paid any money to these plaintiffs with an investigation of the government going on and having already discovered that twelve piers had been built without a particle of reinforcement in them, by this man Guerini.

Moreover, Guerini had had trouble with the government employees, and I am ready to prove that this investigation was brought on by Guerini going to Washington and making unwarranted reports of Captain Stierle and that he solely and entirely was responsible for every bit of the delay after March 8, 1912. He became a mischief maker. No damages in this case and under this complaint and under this proof can be prefaced whatever upon failure to make monthly payments. No evidence of fraud has been shown and none was pleaded. There is no pleading of having done the work to the satisfaction of the defendants. There is no pleading of any waiver. Here then is a case of wrongful retention of payments as a ground of breach and rescission ad liminum as it were of the work, when of the contract less than 500 cubic feet of artificial stone had been laid of 5000 cubic feet according to the proof, and only half of the granite had been set. Unquestionably, as a matter of law, there could have been no breach on account of the withholding of monthly payments ad liminum of the work.

If the Court should by any means or manner say that the work had been started in February, I would answer that it would not make any difference if it had been started for five years, they were not entitled to any payment until they made application on the blanks of the defendant in the manner required thereby and twelve days before they desire payment. They made no such ap-
220 plication, therefore there was no witholding of payments until December 1911; and the Court will note that covers the period of the first cause of action and covers the greater part of the period of the second cause of action, but they made no further application after they got that money until March 9th. There was no breach by wrongful withholding of money.

I state another ground, if the Court please, that there cannot be any recovery here on a quantum meruit or under the contract because the contract has been terminated, cancelled and broken, and no proof whatever has been made of any quantum meruit in this case. They cannot recover under the terms of the contract because they have sought to rescind it and to terminate it. Therefore, no recovery whatever could be had for the failure to furnish labor and

materials under the contract or by virtue of its terms. The contract is dead, busted, if the Court please. Therein lies the danger of a person deliberately rescinding and terminating a contract. All his rights under that contract are at an end and have ceased.

My friend hands to me this case of United States v. Behan, 110 U. S. p. 338, that holds likewise. If the party injured by the stoppage of a contract elects to rescind the contract, he cannot recover either for delay or for loss of profits, but only for the value of the services actually performed, as upon a quantum meruit. A United States Court case, one that is frequently cited in building cases. It seems to me, if the Court please, that my friend has misconceived his action here entirely and that it was a great misfortune to the plaintiff when they broke, rescinded and cancelled their contract, and that the action should be dismissed on the grounds stated.

The Court: Where was this contract executed?

Mr. Wait: It was executed and is made I believe in New York but it was to be performed here.

The Court: What law would govern, of New York?

Mr. Wait: As to the rights of the parties under the contract I should think the laws of the state. As to the laws of mechanics' liens, as to laws arising out of local conditions like mechanics'
221 liens and hundreds of other similar cases which govern domestic relations, undoubtedly the laws here would apply. That would be my immediate conclusion. As to the construction of the terms of the contract, I should say unquestionably the law of the state in which it was made would hold.

The Court: Where was it to be performed?

Mr. Wait: Well, in part here and in part in the states. It is not specifically stated where it was to be performed. It was expected to be performed in part in the states and in part in Porto Rico.

The Court: What part was to be performed in the States?

Mr. Wait: The structural steel, the samples of the stone, the plans and the drawings.

The Court: Wasn't all of that to be delivered here?

Mr. Wait: To be delivered here.

The Court: Did it become subject to the Guerini people until it got here?

Mr. Wait: I think, Judge, that all the materials such as sand and stone, native materials, except the cement, undoubtedly was brought here.

The Court: Where was the contract broken or where was it rescinded, in New York or in Porto Rico?

Mr. Paine: I can state that the letter was written from Boston, Mass., to New York, N. Y., stating, not that the contract was rescinded, but that it was terminated.

Mr. Wait: I don't believe my friend wants to hedge on that subject when he has made an express declaration in his complaint in paragraph 10: "That under date of May 22d, 1912, plaintiff notified defendant in writing of its election to cancel or rescind said contract and to bring its action for damages for breach thereof."

The Court: The reason I asked is that there is a very elaborate

system in Porto Rico as to rescission of a contract, what hap-
222-27 pened, etc., I do not know. It differs from the common law. It is in the civil law. And I would like to have it in my mind what law governs the rescission or whatever it is.

Mr. Wait: I think it was to be a contract made in New York but performed for the most part in Porto Rico. If it was breached in New York, then it seems to me that the laws of the State would apply. Of course I know nothing about the civil law here. Those are my motions, if the Court please. I apologize especially to the Court officers and to the Court for bringing them back this afternoon, but I thought that the Court might want to reflect upon it before Monday.

Mr. Paine: Does your Honor desire to hear from me?

The Court: Just as you please.

Mr. Paine: I don't feel that I ought to take the time of the Court to endeavor to discuss every single point that was raised by my opponent because it does not seem to me to justify my taking the Court's time. If the Court would indicate any points that it desires light upon.

The Court: You had better reply to the whole I think.

Mr. Paine: My best reply is the decision of the Supreme Court of the United States where the Court had before it the record of the former trial which was almost exactly the same as the present trial. The Supreme Court decided, very far from holding that the Court should not have let the case go to the jury, but that because of restricted instructions, the jury was prevented from bringing in damages enough.

The Court: On the other trial was there any motion such as this at the end of the plaintiffs' case?

228 Mr. Paine: No, I think not.

[Argument by Counsel for Plaintiff.]

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Mr. Wait: My point is with respect to the delivery of the granite and the delay, that there can be no breach of a contract until the part complained of becomes a part of the contract. We owe no duty to the Guerini Stone Company to deliver that stone, so far as their laying the stone was concerned, until we elected to have them lay it. When they elected to lay it and accepted our option, then only did it become a part of the contract, and any act on our part with respect to the delivery of that granite up to that time could not be prefaced as a breach.

Furthermore, they knew and everybody knew and the Court knows from the evidence that no concrete could be laid until after the plaintiffs had placed and set their granite. Now I repeat what I asked my friend in my argument, what act has been proven that constituted a breach by the defendant, what single act, neglect or default has been proven by any witnesses in this case that constitutes a breach? He states that the big thing, the big delay, was after March 9th. There could have been no delay longer than from March 9th to May

22d because he elected to terminate the contract on May 22d and that ended everything.

As to our refusal to give him damages under our contract because we neglected or possibly delayed to furnish labor and materials, if we did not pay him it was his office to come into Court and to enforce that payment under the contract, not unhappily go and smash it and terminate it, and having terminated the contract, he no
229 longer has any rights to sue us under the contract for his losses and damages because we did not furnish labor or materials.

The Court: I have listened to the argument with a great deal of interest. The practice preferred in this Court is to let the case be tried out so that the whole case will be presented for the Appellate Court. I think I will pursue that course in this case. It seems to me there is enough to go to the jury so that the motion is overruled.

Mr. Wait: The Court will kindly grant me an exception. And so I suppose that means that all the separate motions are denied and I take an exception to each of them.

The further hearing of the case was adjourned at this time until 2 p. m., June 6, 1916.

Testimony for the Defense.

June 6, 1916.

DAVID P. OAKSMITH, being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination.

By Mr. Wait:

My name is David P. Oaksmith. My residence is San Juan, and business is Contractor and general construction foreman for the defendant. In 1911 I was in the employ of the P. J. Carlin Construction Company. I was in their employ throughout that year, in San Juan, I arrived here the 25th of August. I came here to superintend the construction of this building. Before me, in charge of the building, was Mr. William Sullivan. I was here from that time, over two years or more.

When I came here, there was granite on the site.

230 Q. Do you know how much?

A. About 125 pieces. I do not know by what boat they had arrived, no granite had been set. The concrete footings for the building were practically all in.

Q. Who was here on the job in the employ of the Guerini Stone Company, the plaintiff?

A. Mr. Guerini and I think Mr. Follett was here.

Q. With whom did you have your communications and connections with respect to the work?

A. Mr. Guerini.

Q. Did you know Mr. Follett?

A. I knew him soon after that. I don't remember having met him the first day.

Q. What were your relations with Mr. Follett? I mean business relations.

A. At the early stage of the work we had very little relations or talking. All my business was done with Mr. Guerini. Mr. Guerini directed the work on the building that was done later. He directed the men in their operations later when they started.

One of the first things that I did when I got here I was called upon by Mr. Guerini to look into the derrick question. There were two stiff legged derricks here, with a length of boom of Sixty-five feet. I have been in the building business about twenty years. In the United States, Cuba, Africa and Porto Rico. I had built buildings before, of masonry, like this building comprising stone, concrete and steel.

Q. Did you have any conversations with Guerini about these derricks?

A. Yes, sir.

Q. Who was present and where was it?

A. The site was down here at the southwest corner of the building where he had his office, and I don't remember that anybody else was present at the time.

This conversation was the 26th of August, 1911. Mr. Guerini was here then. I know what Mr. Guerini was here for.

Q. What was said at this conversation?

A. He sad, Oaksmith, I can't do my work on this building with these stiff-legged derricks, I must have guy derricks, and he repeated it. I said well, Mr. Guerini, these derricks were sent down
231 here for this purpose. They are all right, good, new derricks perfectly complete. He said, Oh, but I can't use that derrick, I must have a guy derrick. I said I will have it looked into, and left him that time. I had a later conversation the next day.

Q. What was said?

A. He repeated his statement of the day previous that he could not use that kind of a derrick on this building; he wanted a guy derrick. He didn't go in detail, but he said I can't use it, excited and determined not to have that kind of a derrick.

Q. Have you used stiff-legged derricks on buildings of this kind?

A. Yes, sir. I have set steel with them, and have set stone with them and have moved concrete with them. There is no objection to them that I know of.

Q. Now with respect to your work, which derrick do you prefer for your work that you were going to do on this building?

A. I would prefer to have a stiff-legged derrick.

Q. What is the advantage of a stiff-legged derrick for a building of this kind?

A. The guys necessary for a guy derrick are not used on a stiff-legged derrick, therefore the boom can swing freely for three-quarters of a circle. The guys interfere with the boom on a guy derrick. A stiff-legged derrick you can move it around and get it in reach

of your work and the guy derrick is fixed in place. The stiff-legged derrick can be moved around on the job. It can be hoisted up to the second and third and fourth stories, you can not do that with the guy derrick, because your guys go out to dead men and you have to splice the guys or take in the guys and that is not feasible.

Q. What did you do in the matter of derricks?

A. I spliced them out into guy derricks.

Q. In other words, did you rebuild the stiff-legged derricks into guy derricks?

A. Into guy derricks, yes, sir.

Q. What did it require you to do?

A. I had to go to the local foundry here and get spiders made. A spider is a round piece of iron with a big hole through the center and small holes around it. That is what you fasten the mast in. Then I had to get a heavy boom and get splicing plates and pins and splice out the masts to seventy feet long. I used the mast of
232 the stiff-legged derrick and made it longer by splicing; then I negotiated for guys and put in dead men. A dead man is a strong timber placed in the ground leaning away from the derrick with a piece of timber in front and a piece of timber at the foot down in the ground and concreted around in order to make it very strong and stiff and to that we fasten the guys.

Q. What else did you have to do to get material or matters for this derrick?

A. I suppose that covers all; I got timbers and iron plates and carpenters.

Q. Was there any delay in getting guys?

A. Yes, sir; there was a great deal of delay.

Q. Now, Mr. Oaksmith, was there any reason that you know of why the stiff legged derrick could not be used by Mr. Guerini?

Mr. Paine: I object on the ground that it calls for a conclusion. The jury should be the ones to judge of that.

The Court: The objection is sustained.

Mr. Wait: Note an exception.

—. I have used stiff-legged derricks to set granite, and to handle concrete. That stiff-legged derrick would handle any granite blocks on this work. Its lifting capacity was five tons. The lifting capacity of my guy derrick was about the same. The stiff-legged derricks would not quite have covered this building as completely as to swinging capacity as did the guy derrick. The length of the boom on my guy derrick was sixty-five feet, the same boom.

Q. By placing the two stiff-legged derricks back to back would they not have covered just as much area?

A. I believe they would. I have been rigging derricks and putting them up and using them for twenty years.

Q. I ask you as an expert, a matter of opinion, whether in your opinion there were any advantages whatever that the guy derrick possessed over the stiff-legged derrick for this work, for Mr. Guerini's work.

A. There were none.

Q. And did you rig up as a guy derrick absolutely at the request and to comply with the wishes of Mr. Guerini?

A. Solely on that request and to get the work started.

233 Q. How much time did it take to provide the parts and erect these guy derricks in lieu of stiff legged derricks?

A. About a month.

Q. How long would it have taken you to erect the stiff legged derricks that were here?

A. About three or four days. I had their derricks up and in place. In the latter part of September; about September 23d or 24th. The next shipment came, the first shipment after I arrived here in September 16, and there were 164 pieces, I think. They were for the main building. Up to September 16th no granite had been set. The setting of the granite began the 16th of October. I do remember that they set some on the 13th and then had to take it up again, a couple of pieces. That had to be taken up because it was set too low. The first granite that was set, that was allowed to stay, was about October 16th.

Q. Was there anything to prevent the setting of granite that you know of between September 23d or 24th when the derricks were up, and October 16th?

A. No, I don't know of any reason why it should not have been set. When I first set up the der-ick, I remember altercation or question as to paying the charges of the derrick, the operating and the engineman when it was first started. I had a conversation with Mr. Guerini about it.

Q. What was said?

A. I told him I was going to charge for the use of the derricks and the operation expenses. The substance was that owing to the cost of the engine, oil and engineer, that the cost would be $15 a day.

Q. What did he say to that?

A. As near as I can remember, he agreed to it.

Q. You can't say he agreed to it. What did he say?

A. I can't remember what he said.

The first granite was set on the southeast corner.

Q. How far was it set between October 15th and October 17th; what length was set and where was it set?

A. The first course A in the southeast corner of about five or six stones.

Q. What happened to those stones?

A. He got them all on a down grade.

234 Q. How much down grade?

A. One inch in the whole length of stones that he had set. It run down hill on a steady grade so that the last stone was one inch too low. They were all taken up and levelled up. Chiselled off the bed and the old cement taken off and new cement put under them and reset again. They were set to a level.

Q. That brings us down to October 17th, and do you remember anything about the cost of operating this derrick that occurred on or about October 21st?

A. Something occurred on that day in reference to the engineer. Guerini said he would find his own engineer and put him there at his expense, at his cost. I don't know why except that he would have more control over him probably. During this time of the setting of this granite Mr. Guerini was on the job bossing the work. He directed the men. He and men that he had directly under him set the stone. Mr. Guerini was in charge of the setting of that stone. I did not see Mr. Follett about the work at that time.

I have recollection of Mr. Guerini's motor burning out. It was a motor he had coupled up to the concrete mixer down in his shed here, on the southwest corner. It was an electric motor. I recall that it burned out.

Q. Did he say anything about the expense of replacing it at that time?

A. Yes, he was very excited and threw up his hands and said: There goes $300 or $400.

Q. And do you know how long it was before he got that motor replaced or a new armature in it?

A. I think it was fully a month.

I do remember about the crushed stone about that time.

Q. I want you to testify from your own recollection, Mr. Oaksmith, about these matters. You may refer to any memorandum you have got but it must be from your own recollection. What happened with respect to the delivery of stone, if you remember?

A. He failed to receive stone, for some reason of the local company which supplied it. The local company which supplied it was the Porto Rico Railway, Light & Power Company.

Q. Do you remember that no stone came in?

235 A. I remember that he was out of stone, yes. He did require stone to back up the granite, when he was setting granite at this time.

Q. Did that in any way delay the work?

A. Yes, he required stone to back it up.

The Court: There is no evidence, is there, as to who Captain Stierle was?

Mr. Wait: I will show that. I agree with the Court.

Q. Who is Captain Stierle?

A. He was the inspector in charge of the building for the government. As far as this building was concerned, he was the engineer in charge. He was the only representative of the government here or Supervising Architect. Captain Stierle was the representative of the Supervising Architect.

Q. On or about November 7th were there any differences between Captain Stierle and Mr. Guerini as to the work and how it had been done?

A. There was.

Q. Did you hear any conversation between them?

A. No, sir.

Q. Did you have any conversation between Mr. Guerini and yourself about it?

A. I may have but I don't remember.

Q. If you know, what did Mr. Guerini do on November 7th that came to your notice?

A. He set some stone. Without Stierle's knowing it. Without getting the lines and levels from Mr. Stierle.

Q. And what did that result in; anything that you heard or knew about of your own knowledge?

A. I believe that was the stone on the southwest corner; if so, it was improperly set.

Q. And what happened?

A. We had a great deal of trouble in fixing it to the satisfaction of Stierle and later of Berryman.

Q. Did that take any time?

A. It did. About three days.

Q. About that time or soon after do you have recollection of a water main being broken?

A. I do. It held up the work, because there was no water
236 on the job. It flooded the bottom of the building here. Before it broke it was all right, and after it broke, it was no good; we had to get it fixed.

Q. What was the condition of it the night or the morning it broke; was there anything on it or under it or about it?

A. It was piled up with rock. Rock was piled on it by Guerini.

Q. And do you know whether or not that caused it to break?

A. Certainly it did. That took, to clear up your work and to get water again, two days about.

Q. Now do you recall anything that happened on November 17th or 15th or 16th, along about that time?

A. There were things happening every day.

Q. Along about that period what was the situation on the work?

A. Things were getting critical then.

Q. What was the situation? What happened?

A. I think that is the time that Guerini went to Stierle.

Q. What did you see, feel, taste or smell on that day? Those are the only faculties you have got and the only way you can know anything.

A. I felt that there was growing ill humor between Captain Stierle and Guerini.

Q. What did you hear?

A. Because Stierle came to me and complained.

Q. What did you see or hear between Stierle and Guerini?

A. I didn't see anything.

Q. Did you talk with Guerini?

A. No.

Q. Well can you tell anything that you saw that day or those days?

A. I saw Stierle in his office.

Q. Mr. Paine doesn't want you to tell what Stierle said. Is that the only thing that you saw or heard?

A. If I can't say what Stierle said I don't know how I can bring it out. He told me.

Q. About that time were there any labor troubles?
A. Yes, there was.
Q. How do you know?
A. I remember labor trouble all through that period.
Q. Well tell what you saw that the jury can understand what you mean.

237 A. Mr. Guerini didn't seem to—there wasn't many men on the work. I saw them going away. I thought it was a later date.

November 15th, 16th or 17th, there were labor troubles then. I came down one morning and saw the group congregated at Mr. Guerini's office door. A group of so-called stone setters and laborers and Mr. Guerini and Follett. My office was up on the corner and I had a window on that side and I could look out and I could hear. I heard high talk, loud talk. I saw Mr. Guerini gesticulating and jumping around excited and finally goes up the street and his Italians follow him. Soon after that Mr. Follett comes to me and says, he was very excited himself, very excited, trembling, and says: Mr. Guerini has laid down on me, turned me down, I don't know what I am going to do. And he says: I hope you will help me out, and I felt sorry for him and promised to do so. I did all I could. I followed his instructions, what he would like to have done and attended to it.

Mr. Guerini came back later. I think it was the same day or the next day. Then he took hold after a fashion and went to work.

Q. Now what was the general situation of the work during this month after the 15th of November until the end of the month? Describe it. Anything that you saw or knew about the building you may state to the jury, or the labor and the men at work.
A. I was very dissatisfied.
Q. That is not what you saw or what you knew about it.
A. I knew that the work was not going on as it ought to be.
Q. In what respect?
A. There wasn't organization; there wasn't any stone setters; there wasn't proper direction of the Guerini Stone Company; there was nothing accomplished in the day.

Mr. Paine: I move that that be stricken out as a conclusion and a matter of opinion. This is an interested witness. His conclusion as to whether it was our fault or theirs.
The Court: The objection is sustained.
Mr. Wait: Note an exception.
The Court: All is struck out that the witness testified to on that subject.

238 Q. Who was directing the work now after this scene that you have described between Mr. Guerini and his men and Mr. Follett?
A. Mr. Follett and Mr. Guerini, Mr. Follett attempted to direct it. There were two bosses.
Q. Did they work to one purpose?
A. They did not always, no.

Q. How long did this condition last?

A. Until Mr. Guerini was called away which was late in December, I think, I don't remember exactly. It was December 4th. Mr. Guerini got back early in January.

Q. Did you have any conversation with him with regard to his intentions with respect to this work and the people who were supervising it

A. I did. That was before he went away. He said that he was going to Washington and he had an influential congressman, that he was going to complain to him in Washington, Captain Stierle, and that he was going to have the whole thing investigated.

Q. Anything else about the conversation? I want your conversation to him as well as his conversation to you.

A. I told him that he ought not do anything of the kind; that he had no reason for such an act that I knew of, but, yes, he said I will do so. He seemed determined to raise trouble.

Q. When he got back did you have any conversation with him?

A. I can't remember. I undoubtedly did have conversations with him.

Q. Do you recall whether you had any conversation about his trip to Washington?

A. I don't remember any conversation with reference to his trip to Washington.

I was in charge of the work in December during his absence. Mr. J. J. Carlin was here too. He is likewise an employee of the company. I considered myself under him.

Q. Did you hear any conversation between John J. Carlin and Guerini about this matter of going to Washington?

A. I don't remember of anything.

Q. Did Mr. Guerini in that conversation that you mentioned say anything about the work and the manner in which it had been done?

A. Yes, he did. He said the work had not been done right. He had been here all the time and he was watching it as an American citizen.

239 Q. Did he say anything about complaining to any of the local authorities here about it?

A. Yes.

Q. What did he say?

A. He said he had seen the mayor of the town, if I remember; and the governor, I think he said.

Q. Now up to December 1st, do you know how many cubic feet of granite had been set from October 15th to December 1st or 2d; do you remember how much was set between those dates, about?

A. About 1,500 cubic feet.

Q. Had been set? I am speaking about during the month of November and half of October.

A. I can't remember that.

Q. I will have your report in a moment I think. Did you make daily reports on this job?

A. I did.

Q. And have you sought and endeavored to refresh your recollection from those reports within the past two days?

A. Yes, I have tried to.

Q. And have you made some memoranda from those reports?

A. Yes.

Q. Now when Mr. Guerini came back in December or after he went to the States did any one else come down to take charge of the work?

A. Yes, there was a man came down to take charge, a Mr. Lootz. I believe he brought a letter with him to Mr. John J. Carlin, a letter of introduction. Mr. Lootz came down as a superintendent. I don't think he came back with Mr. Guerini. I think he came before Mr. Guerini got here. He did take charge. Mr. Russell came with him, he was boss carpenter.

Q. What happened to the work while Mr. Lootz and Mr. Russell were here?

A. Things started up and they went on as they should.

Q. What do you mean by that, as they should?

A. They went on with some progress, some regularity, some order, some accomplishment. The work took a brace.

I have employed foremen and workmen, and have checked them on public work. This man Russell was a live wire.

Q. Did you consider him a very competent and capable man?

A. He was a good man. Mr. Lootz was all right too, except that he had no health while he was here. He was sick. He stayed
240 a very short time. Russell stayed about two months, I think. When Mr. Guerini came back, Mr. Lootz went about that time.

Q. Was Guerini or Russell in charge, or Follett, so far as you knew after Guerini came back? I mean from your observations on the work who would you say directed it?

A. Mr. Guerini, Mr. Follett was here part of the time. Mr. Guerini returned to San Juan early in January.

Q. Now when was the next large shipment of granite that you have any record of, that you know about? Is this your memorandum (handing a paper to the witness)?

A. Yes, that is it. I know that those are correct, except the first one. The Wilhelmina, was here before I came on August 25th, that stone was here on the job.

Q. Will you read the dates when the different cargoes of granite came in here and the amount that was received, that is, that you know of your own knowledge?

A. August 12, 1911, 136 pieces were here when I got here, September 22, 1911, 317 pieces, December 6, 1911, 164 pieces, January 11, 1912, 433 pieces, March 13, 1912, 20 pieces, April 13, 1912, one piece.

Q. Now Mr. Oaksmith, of those twenty pieces that came, had some of those or not been broken at the job and had been recut in Providence?

A. Yes.

Q. Now of those last two shipments, where did that granite go, the bulk of it?

A. On this south approach here. It was not in the building at all. It was exterior to the building. The third from the last, the big shipment of 433 pieces did not belong in the building but principally to the south approach, by the approach, I mean the steps. This south approach was a very big affair, outside of the building, and didn't go in the building at all, not in the building proper. Mr. Guerini or the Guerini Stone Company did not do any work outside there.

Q. Now we are down to January 6th, do you remember about that time Mr. Guerini's lifting a large piece of granite?

A. It was not an especially large piece.

Q. Well, what about it; what happened; what did you see?

A. I looked out of the window of my office. I was doing my books and noises outside made me look out and the moment
241 I looked out I saw a stone going up. That stone had evidently fallen. I looked out again and saw it fall and finally it fell again and I went running out there. Mr. Guerini in a big way said: "Oaksmith, I dropped this stone three times, I am going to get it set next time," and up it goes again, and he dropped it again. That made four drops.

Q. Where did it strike the fourth time?

A. It struck on some stones which had already been laid.

Q. What caused the stone to fall?

A. He insisted always on putting the pin lewis in himself and he didn't know how. A pin lewis consists of three pieces of iron. First of all the stone has to have a pin lewis hole drilled in it and then the stone setter arranges the two pieces of iron in the hole in the stone and puts a wedge piece of iron in between the two, and as you lift up on the stone it wedges and then when you want to take the stone off, you slacken the tackle and knock the pin loose. The hole that is cut in the stone is cut so that it is wider at the bottom than at the top. That is the common and ordinary manner of lifting and setting stones. It is the only way to set them. When this stone fell it fell upon stone that had already been set, and it did break them, considerable.

Q. Well what did you have to do with respect to it?

A. We had to take the stone ont of the wall, turn it around end for end, and were allowed by Mr. Stierle to place it in the wall. That took three or four days.

Mr. Guerini had a concrete hoist operated by a motor. I remember of it arriving here, on January 22d.

Q. You have a memorandum of dates there that you have made from daily reports, have you?

A. Yes, sir, and I gave you a copy of it.

Mr. Guerini left this work again a second time. In January, I think, 1912.

Q. Do you remember just before he went an incident about a sprocket wheel?

A. Yes, I remember that. This sprocket wheel was a portion of the concrete mixer.

Q. Did you hear any conversation with respect to it between Mr. Guerini and Mr. Follett?

A. They had a row over it I know. The substance of it
242 was that one wanted to get one made out of brass which would be expensive but quick and the other one wanted to get one founded out of cast iron which would be much slower but much cheaper. This controversy lasted between them a couple of hours or three hours. They finally compromised and got one of each. They got a brass one and an iron one. This concrete hoist was placed in the middle of the north side of the building, in the elevator shaft. I remember distinctly that they had an elevator hoist here.

Q. Why I asked is, Mr. Follett couldn't remember it. Any doubt in your mind whether it was there?

A. I am absolutely sure that they had an elevator concrete hoist here at the north side.

Q. Do you remember about this time of anything that happened as to the inspector of the building?

A. Mr. Berryman arrived. He took Captain Stierle's place. Captain Stierle resigned before that. He told me he had. Mr. Berryman arrived here, about the 25th of January Guerini and a carpenter arrived at the same time. One of the first things Mr. Berryman did was he immediately took up our estimate and figured it and looked at it.

Q. Did he have any conversation with you about it?

A. Yes.

Q. What did he say about it?

Mr. Paine: I object to conversation between the government inspector and this witness because it is not binding on us. The estimates of the government superintendent are not binding in any case. We are entitled to payment on the terms provided in our contract.

Mr. Wait: I will ask a preliminary question.

Q. Mr. Oaksmith, did these estimates of Mr. Berryman include the work that the Guerini Stone Company had done?

A. Yes, sir.

Mr. Paine: That would not make any difference, your Honor. The Guerini Stone Company contract contained an entirely different measure of payment than the contract between the Carlin Construction Company and the government and that has nothing at all to do with the proper amount to be paid under our contract.

The Court: The objection is sustained.

Mr. Wait: Note an exception.

243 Q. Now did Mr. Berryman refuse the estimates that you had theretofore made?

Mr. Paine: The same objection, your Honor.

Mr. Wait: If the Court please, the Court will appreciate that there are two things to an estimate, one is quantity and the other is basis and the third thing is the satisfaction in the certificate or the estimate, and that and these estimates of the supervising architect or his rep-

resentative were condition-precendent to the Guerini Stone Company receivng any money from the defendant. It was made so by the contract, and his estimate is very material to any payments being due to or owing to the Guerini Stone Company.

Mr. Paine: There is nothing about that in the contract between the Carlin Construction Company and the Guerini Stone Company. If he wants to show the estimates as any question of the amount due to the Carlin Company, I object to it because it is not binding on us.

Mr. Wait: This is especially pertinent in view of Mr. Converse's testimony, in which he said that Mr. Carlin told him to make his estimate, in the amounts that the government inspector estimated, and as Mr. Converse said then to put a certain other price, $1.07 I think he said, in his application, and the amounts and quantities that had been certified to by the government inspector. Therefore what the government inspector did is very material it seems to me in view of Mr. Converse's testimony alone.

The Court: What the government inspector did, if material, should be shown by the government inspector. If the statement or certificate of the inspector is material to this case, it should be shown by the inspector just as by any other witness.

Q. Now do you recall any directions or orders by the government inspector with respect to certain piers?

A. Yes, I do.

244 Q. What did Mr. Berryman say about these piers?

Mr. Paine: I object to that. What he did may be material, but what he said is immaterial. I object to it as hearsay.

Mr. Wait: He couldn't do it except with his mouth, because all he could do was to give orders. Do you insist on your objection?

Mr. Paine: Yes, indeed, the way to prove his orders is to have him prove them.

The Court: The objection is sustained.

Mr. Waite: Note an exception.

Q. Did Mr. Berryman give you any written orders with respect to these piers that you remember?

A. No, sir.

Q. Did he give you any verbal orders?

A. Yes, sir.

Q. What orders did he give?

A. He said they had to come down.

Q. Did he say why?

A. Because there was no reinforcement in them. I took that up with Mr. Follett.

Q. What did you say to Mr. Follett?

A. I said, Follett, you have got no reinforcement in those piers and you should have put it in, Mr. Berryman says they have to come down.

Q. What did he say?

A. He objected to taking them down.

Q. That does not tell the jury what he said. Did he say he didn't want to or wouldn't or what?

A. As near as I remember, he refused to take them down unless I wrote him to take them down, and I did write to him.

Q. Now I call your attention to notes on one of the government plans, No. 31 United States P. O. and Ct. H., San Juan, Porto Rico, which I don't suppose there is any objection to the use of, is there? And may I read this note, if the Court please, into the record, it being one of the instructions on the drawing? I don't care to put the whole drawing in.

The Court: There is no objection, as I understand it.

Mr. Paine: You are offering the note on the plan, as I understand.

Mr. Wait: Yes, there is no use of putting the plan in evidence.

Mr. Paine: I object on the ground that these plans were
245 never furnished to us. They are the structural steel plans which we had nothing whatsoever to do with. We were doing the concrete. We had no knowledge of what was on those plans.

Mr. Wait: In the face of that will you make that declaration? There is a receipt for the complete set of plans (handing a paper to counsel).

Mr. Paine: I don't know that there is any obligation on our part to examine plans which referred to the structural steel part which is not in our contract. If there was any reinforcement in the concrete work we were doing, it should have appeared in our plans. I am not going to object to this plan going in but I want to have it on that basis, that I don't admit that this is binding on us. I don't object to the plan with that statement.

The Court: Well the plan is offered and there is no objection.

Mr. Paine: There is no objection.

The Court: The plan will go in, or so much of it as is proper.

Mr. Wait: I don't care to put it all in, but just this part of a note. "General note for entire building. All piers in loggia walls and all in main walls except front center are to be reinforced vertically with six one inch steel rods from basement floor line to top of the walls. Rods to be spaced symmetrically and to be spliced at each floor. Rods at splice to lap one foot each side of floor line, two feet total lap. Reinforcing rods in slabs of loggia roof and floor and piers are to be wrapped around the vertical rods of piers. See detail drawings this sheet."

Q. Was there at that time, Mr. Oaksmith, some dispute between yourself and Mr. Follett as to whether these rods should have been put in the piers or not?

A. There was. I maintained and insisted that they should have been put in and he that they should not.

Q. Now who tore down those piers?

A. The Guerini Stone Company.

246 Q. We have fixed the date I think when Mr. Berryman announced this, as February 7th, and do you know how long it took before those piers were removed and the new ones built?

A. Fully a month.

Q. What was the condition of the piers when the order was issued by you to Mr. Follett to tear them down and rebuild them in accordance with the plans and the specifications?

A. They were standing up and finished and the steel was on them; by steel I mean our floor beams, etc. When they were torn down, I had to remove the floor beams.

Q. And did Mr. Guerini do anything else or was that all the work he did while he was taking these down and rebuilding them?

A. Oh, he did something else but that employed a good portion of his men. I took fully one-half of his men taking down these piers and rebuilding during this month, more or less.

Q. Would you say then that it would have taken all of his force at the same rate two weeks to do it? You say it took half of his force a month.

A. Yes, I think with the force he had it would have taken two weeks.

Q. Now do you recall on or about February 14th while setting some arch stones, of anything happening?

A. Yes. That was the time he broke some more. He broke two stones, so they had to be recut. It certainly did take time. I took two or three days. He did other things, during that period. Yes, yes, something else.

Q. Now at this time do you know whether or not there was reinforcing steel when these piers were built?

A. There was.

Q. When did the reinforcing steel come on this job with respect to when the work was begun by Guerini?

A. I think it arrived here about a month after he started to work. Big shipments came. I think there were two shipments.

Q. Doesn't your memorandum show just exactly when it arrived under date of February 24th there; when it was sent and when it was received?

A. Yes, it does. February 10th was when the shipment was made from New York and it was received here February 18th. The next one was received October 24th, 1911. The next one received the third, November 3d, 1911. That was the last.

Q. Now when these shipments of granite or steel came in
247 here, did it stay on board here in the harbor for a week or a month?

A. No, it was put ashore. After it arrived here, it was unloaded and got on shore, within a day or two days. It was not allowed to stay on the pier. It was put on cars and hauled up alongside the Porto Rico Light & Power Company and from there it was carried across on the shoulders of men and put at the eastern end of the building. I am speaking of the reinforcing steel. The granite when it came was unloaded on dock No. 1 or 2 and I hauled it up here by different manner and means. It did not lie on the dock any length of time.

Q. Now, Mr. Oaksmith, do you remember when this first que-

tion of an investigation arose? When did you first hear anything about that and from whom did you hear it?

A. From Mr. Berryman.

Q. Did you hear it from Mr. Berryman first?

A. No, I believe not; I believe I heard it from Mr. Guerini first. He told me there would be an investigation.

Q. How long after that did the investigation begin or start or did you hear of it from Mr. Berryman?

A. I heard of it when Mr. Berryman arrived here. Immediately after he arrived here. Berryman arrived January 25.

Q. What was one of the first things that you did for Mr. Berryman in connection with that investigation?

A. I got him a gang of men and tools and put them in his charge. He took a gang and went to the eastern end of the building and commenced to dig, between the outside main wall and the loggia wall.

Q. What had you found or discovered before this, if anything?

Mr. Paine: If your Honor please, we have come to one of the points that were settled by the appeal and I object to any questions or any testimony which goes into the question of responsibility between the United States Government and the P. J. Carlin Construction Company for the settling of the foundations. We are not here to try the government's case. We can't try it.

Mr. Wait: I quite agree with counsel, in the short time we have to finish this case, and I have no intention of asking the
248 Court or the jury to determine anything about the responsibility between the defendant and the government. That is not the purpose.

The Court: What is the purpose of it?

Mr. Wait: The purpose is that they preface one of the periods of delay for which they claim we are responsible, from March 9th to some later date, and they have gone into that and I must meet what they have had to say about it.

Mr. Paine: It is agreed that the foundation collapsed.

Mr. Wait: No, there was never any collapse of any foundations.

Mr. Paine: I will change collapsed to sank. If I foresee what these questions are directed to, it is to the result of tests made in the soil, which is directly on the point of who was at fault for the sinking of the foundations, and that line of testimony I maintain is absolutely incompetent, irrelevant and immaterial.

Mr. Wait: I am not quie willing to concede that it is absolutely immaterial, but it is not necessary to the proof of my case and I am not going into it.

(The question is read for the Court.)

The Court: If this is designed to fix the time or the period, that is one thing. I can see how that might come into the case. The objection is overruled.

Q. You may answer if you will.

A. I discovered a small hair crack in the eastern section of the outer wall. I saw it after Mr. Berryman arrived here anyway.

Q. Just describe that crack to the jury.

A. In about this direction (indicating) in this outer wall in this section of the building, a small crack in the upper portion above an archway and it went through it and then it showed again under the window sill, under the opening. It did not seem to be much. The width of that crack was under an eighth of an inch. It was nothing more than through the arch ring and through the window sill below.

Q. Did you know what caused it?

A. Yes, sir, or I know now what caused it. At the time I can't remember if I knew or not.

249 Q. How did you know if you knew? Did anybody know what caused it?

A. An old fort wall under it.

Q. You didn't know that there was an old fort wall under there at that time, did you?

A. I think I did. I think I had been told so by the people around.

Q. Did you know by any of your five senses what caused that settlement at that time?

A. No, I didn't know and I don't suppose that anybody else knew.

Q. What did that result in?

A. It didn't result in anything.

Q. Did't result in an investigation?

A. It resulted in an investigation. Mr. Berryman made that investigation. He dug holes. That is what I gave him the gang of men for.

Q. What did he find that you saw?

A. He found white sand, and nothing else.

Q. Didn't he find any remnants of any old wall, fortress wall?

A. In this pit down here there was good clean white sand as low as the footings and lower than the footings, and other places there was manglares. This wood that grows around the bay, manglares it is called. In other places there was found old fortifications. They were down below the footings of our building. This crack with respect to the fortifications was practically over them; with respect to the white sand, it was nowheres near it. The old fortification was practically under the crack. On either side, it was an ordinary bottom. The ordinary bottom varied as to where we were.

Q. On either side of this crack where the foundations came up, what was there under the wall or under the footings?

A. Earth. White sand, we don't call earth. It was a material darker than white sand and what we call earth.

I observed this crack for some length of time after. It didn't grow. It stayed the some. It was as much as an eighth of an inch wide, about that. This investigation by Mr. Berryman continued to about up to March 6th.

Q. What did Mr. Berryman say on March 6th? He made a report on this condition here after his investigation?

A. Sure he did, yes. That resulted in bringing Mr. Heald down here. He was the Architect's representative from Washington, an engineer. He investigated in connection with Mr. Berryman and myself while he was here.

250 Mr. Paine: Will you- Honor make it appear that my objection applies to each of these questions, that I am objecting to each one of those question- on that line on the same ground.

The Court: Make that note, Mr. Stenographer.

Mr. Paine: And an exception.

Mr. Heald was here about a week, I think. He used Mr. Berryman's men, and the government paid those men. Mr. Heald returned to Washington and I first learn- that the work was to be stopped the 7th of March. I heard it from Mr. Follett, Follett told me. My note on my daily report of that day, March 7th, is Berryman advises Follett to put in no more floor. Mr. Follett told me that. I believe that is the first that I had heard of the work being stopped.

Q. Up to that you had had no intimation and no report from these gentlemen that the work was to be stopped?

A. No. I got notice that the work might be stopped a day or two later, March 9th. That notification was a cable from the home office.

Q. Well, did you stop work on March 9th?

A. Yes, sir.

Q. Was anything said about how long you should stop work, by Mr. Berryman or Mr. Heald or anybody?

A. No, nothing was said about the length of time. Nobody could tell. We did not know at that time anything about how long the work was to be stopped.

About March 13th I had a communication or talk with Mr. Follett about that. Mr. Follett wrote me and wanted to know if he should stop work, if my communication to him was sufficient to stop work.

Mr. Wait: That I think is your Exhibit 2, 3 or 4.

Mr. Paine: I think that is in, yes.

Q. What did you tell him finally on March 13th?

A. I told him the wishes and desires of the Supervising Architect must be respected.

Q. Is that all that you said to him with respect to his stopping?

A. That is all that I know of.

Q. After this March 13th did the Guerini Stone Company
251 do any work and if so, what, on this building?

A. They got their tools together after that, picked up and cleaned up and straightened up. There was no more construction work done by them.

Q. Now during this period when the work was stopped, did you have any conversation with Mr. Follett about his men?

A. Yes, he wrote me.

Q. I didn't ask you for what he wrote. I asked if you had any conversation at the end of March?

A. I presume we talked about the situation, undoubtedly.

Q. Now, Mr. Oaksmith, won't you look at your memorandum that you gave me, March 23d and 25th, and see if you can refresh your recollection as to anything that happened?

Mr. Paine: I would like to ask a question of Mr. Oaksmith, whether the memoranda he is looking at are memoranda he made at the time.

Mr. Wait: Ask him any question you please.

Mr. Paine:

Q. Did you make that memorandum at the time?

A. Yes, that is made from memoranda made at the time.

Q. You made that recently?

A. Yes, sir.

Q. Did you correctly copy the memorandum made at that time into this?

A. Yes, they can be compared.

Mr. Wait:

Q. Mr. Oaksmith, did you write every single day a letter on this job to your employers?

A. I did.

Q. And then is this memorandum which you have in your hands and which you gave me a copy of, made from that?

A. It is.

Q. And you have the daily reports from which you can verify these things if the opposing counsel wants it?

A. I have.

Q. What conversation did you have with Follett on or about March 23d or 25th?

A. I said Follett, I want to know how many men you have and of the different classes and of the different prices, and he seemed to take offense, that I was prying into his business. He said to go to hell; I don't have to give you these names and prices. It is my business and none of your business.

252 Q. Did you tell him what you wanted it for?

A. No, I didn't tell him what I wanted it for.

Q. Had you been instructed by your employer to get it?

A. Yes, sir.

I know when this work was ordered to be stopped by the supervising Architect through Mr. Heald. It was April 1st.

Q. Is that when you got your instructions from Mr. Heald?

A. That must have been the date. I copied this correctly from the reports. Mr. J. P. Carlin, the gentleman in the court room, was here at that time. It was he that wrote a letter to Mr. Follett on April 3d 1912. After March 9th I know what was done with the foundations of this building. We sort of underpinned or shored them up. That was done by taking a certain part of the building

and going along as near as possible consecutively so as to finish one portion of the building at a time. We were underpinning, May 27th. That was the date that we began.

Q. Well did you know at the time that you were underpinning those walls, anything about how long it would take or what you were required to do, except that you got your instructions from the government representative?

A. I didn't know how long it would take. I knew what I had to do.

Q. Did anybody know how long it would take?

A. No.

Q. Now I ask you again if when you began this work on May 27th, if you worked under one side or end of the building, if so, which one?

A. We started on the northwest corner.

Q. And did you take care of that end first?

A. We came right along on the north side.

Q. Were you on this job during the construction and completion of the building, that is, did you stay here after Mr. Guerini went away?

A. Yes. I remained in Porto Rico right along.

Q. And do you know what it cost to complete this Guerini contract?

A. Yes, sir.

Mr. Wait: I call attention to a provision, if the Court please, in the contract, No. 5. "Should the sub-contractor at any time re-
253 fuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality and quantity, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on his part," etc., that then we may do it at our own expense and charge it to the sub-contractor, and, if it exceeds the contract price, he must pay us and if it is less than the contract price, then we pay him the difference. It is under that clause of the contract that I propose to present this testimony.

Q. Now have you your books, Mr. Oaksmith, kept for the Carlin Construction Company?

A. Yes, sir. I did keep those (presenting books to the witness). They consisted of ledger and journal and cash book. Those are the books. I kept them from the time that I came here. I will qualify that. One period a bookkeeper from New York was here, and he was keeping the books under my supervision and direction.

Q. Do you know that these books were correctly kept while you were here?

A. Yes, sir. I saw them daily. I disbursed the money that was spent on this building. I know for what it was spent and how much was spent. I have gone through these books and made a digest or statement from them.

Q. Can you go through those books and state what was paid for payrolls and different classes of materials?

A. Yes, sir.
Q. Do those books show that?
A. They do.
Q. Can you separate the monies that you paid on account of the Guerini contract from what you paid to set the structural steel?
A. Yes, sir. I can separate also the brick work. That brick work is the brick work along the corridor here.
Q. That was all the brick work there was in the building, wasn't it, practically?
A. The cross-walls.
Q. Is any part of the cost of the trim and this marble work and the grills and the iron doors, is that in there?
A. No.
Q. Had you anything to do with the price of that or the cost of it?
A. No. Nor the labor for setting it in there.
Q. You know those books are correctly kept?
254 A. Yes, sir; certainly. I have separated or isolated what I paid for payrolls.
Q. What was paid for payrolls?
A. $61,020.63.
Q. How much of that was for the Guerini work?
A. $4500.00.
Q. What was that $4500.00 for?
A. For setting steel and laying brick.
Q. Do you know how many thousand brick there were?
A. 200,000.
Q. Do you know what a fair and reasonable price of laying brick was in San Juan at that time?
A. $15.00. Per thousand.
Q. Do you know what it was worth to set that steel?
A. Yes, about $10 a ton. That is a fair price here.
Q. How do you know? Is that what you set it for?
A. It would come out to about that I think..
Q. I don't want any thinks about it, do you know?
A. I frequently figured it up, during the progress of the work.
Q. How many tons of steel were there that you set after Guerini quit?
A. About 150 tons.
Q. How much did you set, altogether in the building?
A. 300 tons.
Q. Does that mean that about 100 or 150 tons had been set when Guerini left?
A. Yes.
Q. If you deduct that $4,000.00, was it?
A. Yes.
Q. What other items enter into the cost?
A. Material, crushed rock, sand, which we furnished.
Q. What was the total amount of those bills?
A. $11,192.99, which was at market prices here.

Q. What else did you spend on this work of doing the Guerini work under the Guerini contract?

A. Nothing else that I know of; labor and material.

Q. Didn't you have a subcontractor on it?

A. Yes. We certainly paid him something. The sub-contractor was paid $35,150. He did the outside facing of the exterior walls. By that I mean the artificial stone.

Q. Have you that all aggregated, of the material and of
255 the payrolls of the subcontractor, have you that added up there?

A. Yes. It aggregated $96,780.74.

Q. How much did you deduct from that?

A. $4,500.00.

Q. And that leaves?

A. $92,280.74.

Q. Mr. Oaksmith, tell us what that work included that you have given for the net price of ninety-two odd thousand dollar-, what work?

A. It was the exterior walls, the floors and the roof, concrete, and the cross walls, some of which, the exterior walls, were done by the sub-contractor and others were done by ourselves. It did include the concrete stairs. It did not include any wood work.

Q. Did it include any metal work, the butts or anything of that kind?

A. No, they were separate contracts.

Q. Did it include anything else?

A. Not that I can remember. It did not include the setting of any granite.

Q. Mr. Carlin calls my attention that you say the labor was $61,000.00 and he questions that. Have you any memorandum there to show you?

A. I have the wages account in the ledger.

Q. Mr. Carlin thought it was $48,000.00 instead of $64,000.00. He thinks you have got your materials added in?

A. He is right.

Q. How do you make that out?

A. I take the total amount of cost up to July 1, 1914, and in my testimony just now I had failed to deduct $11,192.00, which it had cost before March 1st, leaving $49,827.64.

Q. How much does that reduce the total amount of ninety-two odd thousand dollars? Does that reduce the aggregate, the final amount at all?

A. Yes, it does by $11,192.00. That was for wages before March 1, 1913.

Q. Well if the Guerini Stone Company stopped in March, 1912, shouldn't that be in the account?

A. No, because we were underpinning in that time.

Q. Well how much should be deducted?

A. The proper amount for wages for that period is $48,827.64.

Q. And then from the final amount of ninety-two odd thousand

183

dollars, you should deduct how much, $11,500.00, something like that?

A. No, sir; we should not. Because the first amount that
256 I gave you was correct. I had not used the $61,000.00; I had used the $49,000.00, which is the net amount, $48,827.64, and the work cost $64,000.00 less $4,500.00.

Q. Then your first figures were correct, were they?
A. They were correct.
Q. You insist that your first figures were correct?
A. Yes, I believe those first ones were correct.

A. Juror: May I ask a question of the witness?
The Court: Yes.

A Juror:

Q. How much did you pay on account of the completion of the Guerini contract?
A. $92,280.74.
Q. Didn't you make it something like $45,000.00 before?
A. That was for a portion of that amount; that was for the wages on that amount.
Q. But the total amount of it was?
A. $92,280.

Mr. Wait:

Q. Mr. Oaksmith, are the figures $49,000.00 for labor, $11,500.00 plus for materials, and $35,150 sub-contract, and does that make $96,000.00?
A. Yes.
Q. And then you take $4,000 out and that leaves $92,000?
A. Yes.

Mr. Paine:

Q. Let me have that again, Mr. Oaksmith?
A. $49,827.64.

Mr. Wait:

Q. For what?
A. For labor, payroll; $11,803.10, for material, and $35,150, sub-contract makes $96,780.74; which less $4,500 gives me $92,280.74.
Q. Do you know of your own knowledge that that money was disbursed for this concrete work that you enumerated?
A. I was the distributing agent of that money.
Q. Did you pay the bills?
A. Yes, sir.
Q. Did you pay the payrolls?
A. Yes, sir.
Q. Write checks for them?
A. Yes.
Q. And disbursed the money here in San Juan?
A. Yes.

Q. And did you keep books of it too?
A. Yes.
Q. When you first came down here in August, 1911, what was Guerini doing? Did you see him every day nearly?
A. He was in that shop down there at the corner all the time that he was not out in the city. I went into the shop. I saw him working there. He was directing and helping to make moulds, of
257 plaster; they were for this work. Plaster of paris moulds for decorative work.
Q. How many men did he have when you first came here?
A. Not over two, only one working in the building, down there in the shed, and one fellow knocking around on the outside.
Q. Is that all the men that he had working under him on this building?
A. Yes.
Q. Was he busy, that is, did he appear to be occupied?
A. Not very.
Q. Was the man occupied with him?
A. One fellow, Frank, an Italian, was working quite steadily and constantly down there in the shops.
Q. What did you see Guerini do with his fingers or hands, if anything?
A. Mostly looking over the plans and talking with this moulder in the shed down there.
Q. Now there is what we call moulding and there is what we call modelling in clay; which was he doing, moulding or modelling?
A. Moulding. He was moulding it in plaster of paris. I mean with plaster of paris, he shaped it into figures. Then when it hardened he set it aside. He made about 30 such moulds that I saw, up to the time that I came down here. I would estimate about thirty were in the shop. They would average three cubic feet. They were about three feet long and a foot wide and a foot deep, on an average. Nothing had been cast in them as far as I saw.
Q. Do you know whether Mr. Guerini did any work outside for other people?
A. Yes, I do.
Q. Did you see any work in his shop for other jobs than this Federal Building?
A. I can't remember ever seeing other work in his shop.
Q. You have employed masons and men around about other work, have you, Mr. Oaksmith, for many years?
A. Yes, sir.
Q. Was Mr. Guerini, in your opinion, a competent workman?
A. No, sir.
Q. Was he in your opinion, a competent modeller or moulder?
A. Yes, sir.
258 Q. Was he a man that was competent to handle other men as a superintendent or foreman, in your opinion?
A. No, sir.
Q. Was he a competent employee or workman, that is, mechanic?

A. Yes, when he had somebody over him, and when there was not a conflict of authority.

Q. Did you have any talk with Guerini about artificial granite?

A. I don't remember having any.

Mr. Wait: Your witness.

A Juror:

Q. Mr. Oaksmith, I think you testified that there were several pieces of granite that had to be pulled down and reset. Can you tell me whether that was because of the foundations not being level or by the bed of cement, whether being thicker at one end than the other, or by the stones not being parallel?

A. It was caused by the setting of the stone, not by the foundations.

Q. By the setting of the stone?

A. By the setting of the stones; they were set unlevel, out of line.

Q. Mr. Oaksmith, in bringing up the foundation on which granite is to be set, or water table, is it customary to bring the concrete up to an exact level?

A. Oh, no. It is left slack. It must be.

Q. In other words, it is left a little low in order to put a bed of mortar on it to set your stone?

A. Yes.

Q. How much is it left slack?

A. If you are working with something rough about an inch is enough, but with this granite about an inch and a half.

Cross-examination.

By Mr. Paine:

Q. Mr. Oaksmith, I have a couple of pictures which I think you testified about in the first of your examination. Will you look at them and see if you can tell from your knowledge of the site about when they were taken?

A. These two were taken October 2, 1911. They correctly represent the condition of the side at the time.

Q. Now see if you can point out to the jury any substantial amount of granite on the site on October 2, 1911?

A. The granite in this picture cannot be seen because it
259 was piled all along the western end, and as a matter of fact I do show you one piece there and the rest of it was along the side wall. They came up and dumped it along the western end here, and this was taken, as you can see, from our office which stood on the northwest corner, and for that reason you can see no granite. Yes, one, two, three, four, five, six, seven, eight you can see eight stones.

Q. Now isn't the other one taken the other way so as to show the other end?

A. This one is taken from the southeast corner. Yes, this was taken from the opposite direction and you can see granite through

here, piled up there, right there, (indicating on the photograph), that is the granite I am speaking of.

Q. Oh, that is it right there; there isn't much of a view of it, is there?

A. No, this is a better view. It was all on that western end there.

Mr. Paine: Have you any objection to my showing these to the jury now?

Mr. Wait: You had better offer them in evidence first.

Mr. Paine: May I offer these in evidence now, your Honor?

Mr. Wait: Let me see them. I suppose they are all right. No objection.

The Court: Admitted without objection.

The two photographs in question were then placed in evidence and marked: Exhibits 28 and 29, respectively, for the plaintiff.

Q. Now, Mr. Oaksmith, you spoke of a motor which went to pieces?

Mr. Wait: No, burned out.

Q. Burned out; what was that motor used for?

A. Turning the concrete mixer.

Q. Wasn't that a little motor that Mr. Guerini had to run his modelling shop with?

A. He may have mixed concrete for his shop but at that time he was mixing concrete and backing up the granite.

260 Q. When was that that happened?

A. May I refer to my notes?

Q. Yes, certainly.

A. It was November 2d.

Q. That was November 2d. Now are you quite sure Mr. Oaksmith, that that was the little engine that Mr. Guerini was using in connection with his modelling shop?

A. No.

Q. He was not using that to mix concrete to back the granite then, was he?

A. Sure he was.

Q. Now you told us about the dates that the granite arrived and I took them down this way. You can refer to your notes and see if I am correct, if you like?

A. Yes, sir.

Q. You said that on August 12th there arrived 136 pieces.

Mr. Wait: Did he say August 12th?

Mr. Paine: That is what I took down.

A. That was taken from the report of the man that was here before me.

Mr. Wait: I think it was the 16th.

Q. And September 22d, 316, and December 2d, 165, January 11th 433, and March 13th, 20 pieces, and April 13th, one. Now isn't

it really a fact, Mr. Oaksmith, that the Guerini Stone Company set that granite as fast as it came and could be set?

A. No. That big shipment came on January 11th, 433 pieces.

Q. Now isn't it a fact that on January 25th the Guerini Stone Company had set practically all of that granite?

A. Practically all what granite?

Q. Of all the shipments?

A. There were piles of it around the building at that time.

Q. I am going to tell you what is already in evidence here as the testimony of Mr. Berryman, the Government Superintendent. He said:

Mr. Wait: Did you read that evidence?

Mr. Paine: I certainly did.

Mr. Wait: What page?

Mr. Paine: 82 of the record. The question is:

Q. Now when did you come to Porto Rico, Mr. Berryman?

A. On the 25th of January, 1912.

261 Q. At that time did you come down to take this position?

A. Yes, sir; my appointment dated the 15th.

Q. At that time about what progress had been made on the Federal Building; how far up was the building?

A. You mean in percentage? I can give you the exact percentage.

Q. No, in words so that the jury can understand. Was the basement up or the granite laid, or what was done?

A. The granite work was almost as high as it is now.

(And that was in November when he was testifying.)

Q. How high is it now?

A. It is finished practically except—that is, the walls are, except on the south side, which is either one or two courses down, and the buttresses and steps and terrace walls on the side.

Q. Now after hearing the Government Superintendent's testimony, are you inclined to change yours? Does that refresh your recollection?

A. Yes, that refreshes my recollection.

Q. That is about right?

A. That is about right.

Q. And these buttresses and walls on the side were not included in the Guerini contract were they?

Mr. Wait: I object to that.

Q. It is a fact that the Guerini Stone Company got the granite set a few days after that big shipment arrived.

Mr. Wait: We never disputed that you did not set nearly all the granite for the building. That was for the outside here. As far as the granite in the building was concerned, we maintain that you were not delayed a bit.

Mr. Paine: That settles the granite question then.

Q. Now I am going to ask you about that question of rebuilding the piers, when you told about your dispute, do you remember, with Mr. Follett, about putting in those piers where there was no reinforcement?

A. Yes.

Q. At that interview that you told about, didn't Mr. Follett claim that inasmuch as it was your duty to furnish the steel, that it was your duty to put them in?

A. I don't think he would have claimed such a thing, Mr. Paine.

Q. Do you mean that it was the Guerini Stone Company's
262 business to put in the steel reinforcement?

A. I certainly do.

Q. I am going to show you a copy of the contract and ask you to show me where it says that, to put in any steel?

A. I don't think it speaks of it.

Q. I couldn't find it?

A. It was the custom for each man to place his own reinforcement.

Q. That was the substance of the scrap, that Mr. Follett claimed that you should stand the expense and you claimed that he should?

A. Yes, that was it.

Q. And you decided that he would put them up and leave the question of charges to be decided later?

A. He agreed to put them in.

Q. And the total expense was only about $300.00, was it? Isn't that what he charged you for the whole business, taking them down and putting them in?

A. I believe he rendered a bill but I forget the amount now.

Q. Wasn't it $300.00?

Mr. Wait: That is what I understood from Mr. Follett.

Q. So after all, that was not a very great matter was it?

A. Yes, it was.

Q. Now you cited a very heated interview with Mr. Follett in which he told you to go somewhere and you said that you came around and asked him about the number of men he had employed and the amount of material he had, and you said you didn't tell him why you wanted to know?

A. Yes.

Q. Don't you suppose that was why he made that remark, if he made it?

A. He certainly made it. He was very angry that I should ask him for those men and the prices.

Q. Without telling him why you wanted it?

A. No, I did not.

Q. Now, Mr. Oaksmith, about these amounts that you claim to have spent in connection with the work covered by the Guerini Stone Company's contract, will you give us the periods during which those amounts were spent?

A. Yes, sir.

(The witness refers to his notes.)

Mr. Wait: I think I will object to that as being immaterial.
263 I think the purpose of that is to show how long we took to do this work, and if that be the purpose, it is entirely immaterial, because after the plaintiff- rescinded the contract or terminated it, they no longer had any interest in the progress of the work and defendants were at liberty to take as much time to complete the work, so far as they were concerned, as they chose or pleased. And the purpose of that undoubtedly is to bring before the jury when it was done as giving the impression how long it would have taken if plaintiffs had proceeded with their work. And I submit that it is no evidence whatever of that fact.

(The question is read for the Court.)

The Court: The objection is overruled. If the amounts are in, it is only right to get in when they were spent.

Mr. Wait: Note an exception please.

A. Wages from March 1, 1913 to June 27, 1914.

Q. How much concrete work was there altogether in the building?

A. I can't say. I never estimated that. These daily reports that I said I kept every day don't show that.

Q. Didn't you as representative of the Carlin Construction Company ever know how much concrete went into the building?

A. Personally, yes.

Q. How much concrete went into it?

A. On certain dates?

Q. Altogether?

A. No, altogether, I can't say that.

Q. You never did know how much concrete went into the building?

A. No, sir.

Q. Do you know how much concrete was required to do the work covered by the Guerini Stone Company's contract?

A. No, sir; I don't know, and never did know. I don't know how much concrete went into this sub-contract that I spoke of for the outside walls. I never estimated that.

Q. How did you pay the sub-contractor?

A. How much was he paid?

Q. Yes, on what basis?

A. That was a contract between Mr. Carlin and the sub-contractor.

Q. You paid him, didn't you?

264 A. No, I did not make the payments to the sub-contractor. I made all the other payments. I didn't pay the subcontractor.

Q. Didn't you testify yesterday that you made all the payments you were testifying to?

A. All I testified to.

Q. Didn't you testify the amount paid to the sub-contractor?

A. Yes.

Q. But you didn't pay the amount?

A. No.

Q. How did you know that was paid?
A. I saw it in the contract.
Q. Do you know whether it was actually paid?
A. Yes, I have seen the final receipt, but I didn't pay it myself.
Q. You say you have made all these payments that you testified to with the exception of the sub-contractor?
A. Yes, everything that was paid here I did. I signed the checks and made the payments myself.
Q. You were in charge were you?
A. Yes.
Q. And you made the payments covering the concrete that was not included in this sub-contract?

Mr. Wait: I submit that it should be stated what time he refers to.

Q. During these periods that you have just given as the periods during which you made all these expenditures.
A. I bought the sand and the stone and the cement. Sometimes the cement was bought in New York.
Q. So it is a fact that you did not make all the payments included in this lump sum.
A. Everything that was paid here.
Q. Was there anything in that lump sum that was not paid here?
A. The sub-contractor and some of the cement. I don't remember anything else.
Q. So you personally did not pay all the amounts included in this total that you have given us?
A. With that exception.
Q. Now when you bought your material, your cement, crushed stone and sand, didn't you ever figure how many yards of concrete you had to make?
A. No, sir.
Q. Never knew how many yards of concrete went into the building?
A. No, sir; it wasn't necessary.
265 Q. Or how much you were making or had to make?
A. No, sir.
Q. Now Mr. Converse testified that the total number of cubic yards of concrete covered by the Guerini contract was 3,298 cubic yards, would you say that that was correct?

Mr. Wait: I object, if the Court please. He said he didn't know. He has said that three or four times over.
Mr. Paine: This is cross-examination and I have a right to bring out how much he knew about it, not only whether this amount was actually paid, but whether it was a reasonable amount to pay or an unreasonable amount.
Mr. Wait: But when a witness has said that he doesn't know a fact, he shouldn't be asked what the amount is.

(The question is read for the Court.)

The Court: The objection is overruled.
Mr. Wait: Note an exception.

A. I can't say as to that.

Q. Have you any idea at all. I want to get somewhere near so we will have a basis to talk about. Haven't you any idea at all?

A. How much did he say it was?

Q. 3,298 cubic yards.

A. I don't know.

Q. Let me ask you this, would you say that there were a thousand cubic yards or twenty thousand cubic yards?

A. No, I wouldn't say there was as much as that.

Q. Would you say that there were less than five thousand?

A. Yes.

Q. Would you say that there were less than five thousand?

A. You have reference to the Guerini Stone Company's contract; yes, something less than five thousand.

Q. Would it be less than four thousand, then we will about get to it?

A. I should think it would be around there.

Q. So that 3,298 cubic yards is not far off is it?

A. It is merely a guess on my part now.

Q. But you were here all the time and you saw the work
266 done and you were in charge?

A. I didn't have the interest to know those things.

Q. And would you say that the testimony that the Guerini Stone Company did actually 850 cubic yards of this was approximately correct?

Mr. Wait: I submit, if the Court please, that this has been proved by Mr. Converse and we haven't attacked it and it stands. Moreover this is not cross-examination. I didn't go into the quantities of concrete at all and I therefore object to it.

The Court: The objection is overruled. This is testing the knowledge of the witness.

Mr. Wait: Note an exception.

A. I should think that was more than they put in.

Q. Well, about how much more?

A. That is about twice as much, according to my idea. They only backed up the stones around the wall.

Q. Let me refresh your recollection. You were present at the first trial of this case and you testified.

A. Yes, sir. I heard Mr. Carlin testify.

Q. Did you hear him testify that the Guerini Stone Company did about 23,000 cubic feet of concrete?

Mr. Wait: I object to that.

The Court: The objection is sustained.

Mr. Paine: Note an exception.

Q. Did I understand you to say that all they did was to put in the concrete backing to the granite?

A. No, they did more than that of course. They did a lot of interior floors and walls.

Q. Now would you say that 850 cubic yards was excessive?

A. To my mind it seems like a great deal of concrete for the work that they did up to the time they quit, in the work that was accomplished.

Q. How many cubic yards would 23,000 cubic feet make?

A. How many was it?

A. 23,000 cubic feet, divide that by 27 and see how many cubic yards you get.

A. 850, about.

266a Q. That is the amount that has been testified to as the amount of concrete done by the Guerini Stone Company, so if you subtract that 850 from the 3298 cubic yards, wouldn't you get the amount left to be done?

Mr. Wait: I object to this.

Mr. Paine: This is very pertinent in testing the credibility of the witness.

The Court: The objection is sustained.

Mr. Paine: I don't like to seem insistent, but the witness has testified that his company spent over $90,000 in doing the work which the Guerini Stone Company had under its concrete contract. Now I want to show that it was impossible; it was exorbitant, and the best way to show it is to show the amount of work to be done and then to find out how much it cost under their claim to make a cubic yard of concrete, and then we can find out whether the jury is ready to believe that they spent that amount of money on that work or whether they wasted the money.

The Court: Any new facts that show that, would be material, but to ask the witness to add or subtract is a waste of time.

Mr. Wait: I submit that the facts are already in.

The Court: I am with you.

Mr. Wait: Thank you.

Mr. Paine: Note exception.

266b Q. Now then, Mr. Oaksmith, it is in evidence in this case that the amount of concrete covered by the Guerini Stone Company's contract was 3,298 cubic yards; the amount done 850, and the balance was 2,448 cubic yards. It has been testified that the amount of concrete in the exterior walls was 1090 cubic yards, leaving a balance of 1358 cubic yards included in the interior floors and walls. You testified yesterday that you sublet part of this concrete work; what part was that?

A. The exterior.

Mr. Wait: I object to that or the promises that preceded that question and suggest that the question should be limited to what was the amount of your subcontract. All that went before was not material to the question.

Mr. Paine: We are going to bring out from this witness what they spent this money for.

The question is read for the Court.

The Court: What part was sublet; it is overruled.

Mr. Wait: No; to the premises that preceded it, and I move that that be struck out.

The Court: Yes, that will be struck out.

The Court: Answer the question. What part did you sublet?

Mr. Wait: Note an exception.

Mr. Paine:

Q. What part did you sublet?

A. The exterior walls.

Q. And that left, according to your testimony yesterday,
267 something over $62,000.00 that you claim to have paid for making the interior concrete walls and floors; isn't that right?

A. $61,630.84.

Q. And you spent all of that in putting the concrete into the interior walls and floors of the building?

A. No, we have to deduct from that $4500.00. The final amount is $57,130.84. That is the amount we claim to have spent in putting the concrete into the interior walls and floors of this building.

Q. Now, Mr. Oaksmith, in your experience in concrete work, have you any idea how much a cubic yard of concrete of the mixture used in this building ought to cost?

A. It depends largely on circumstances, Mr. Paine. The price of stone and cement. We had to pay different prices for stone. I know the average price.

Q. Well now can't you give the jury an idea what it cost you to do a cubic yard of concrete on the building, including everything?

A. Approximately $17.00 a yard.

Q. $17.00 a cubic yard; do you think that is the actual cost of a cubic yard of concrete to the Carlin Construction Company put in the building?

A. At some time it might reach the cost and at other times it might not reach the cost and at other times it might be over the cost. That includes the concrete in place, and overhead here in Porto Rico.

Q. Now then if it was a fact that the interior walls and floors totalled 1,358 cubic yards and it cost you $17.00 a cubic yard to make it, the total cost to you was $23,086, wasn't it?

A. Yes.

Q. Now you say you spent $35,150.00 on that sub-contract?

A. Yes, sir. The sub-contractor was Annibale Guerini. The same Guerini that I said all these unpleasant things about. The Carlin Construction Company got him to do the work, and paid him $35,150.00 to do the exterior walls.

Q. Now you paid all these bills, you know what these things cost in San Juan, materials, labor, etc.

A. Yes, sir. At that time lumber was costing about $28.00 to $31.00 a thousand.

Q. Do you know how much lumber it takes to make the

268 forms for a square foot surface of concrete in place on one side?

A. Only one square foot of lumber.

Q. Don't you have to have some braces?

A. Certainly you would.

Q. Did you ever work out in your experience in business in estimating on jobs or figuring expenses, did you ever work out the number of square feet of lumber it takes to make a cubic foot of concrete?

A. That is not the way I figure it.

Q. How do you figure the lumber cost?

A. I figure how many cubic feet I have got to cover and the size of my forms required and calculate what lumber I would require.

Q. Do you calculate the number of cubic feet of lumber in the whole job at the start?

A. It depends on the job. Take for instance a building standing on columns twelve by twelve. I will see how many feet of board measure each column will require and then multiply by the number of columns I have and then allow twenty or twenty-five per cent for waste and so I get at the number of thousand feet I require. I never did that on this building. I never estimated the number of cubic yards of concrete I would have or the amount of lumber I would need. Thirty dollars a thousand was a fair price for lumber in San Juan, at that time.

Q. Did you ever figure the cost of wooden forms per cubic yard of concrete on this job?

A. No.

The cost of cement in San Juan was about $1.80 a barrel, at that time. In the concrete mixture we used on the interior walls and floors we used about one and one half barrels per cubic yard. The sand cost down here a dollar a yard, about.

Q. Do you know how many cubic feet of sand went into a cubic yard of concrete of the same mixture?

A. About twelve or fourteen cubic feet of sand. For our crushed stone we paid $31.20 a carload of twelve meters.

Q. Do you know how much it was a cubic meter?

A. Well you would have to divide $31.20 by twelve, which would give you the price per cubic meter.

Q. Now Mr. Oaksmith, on the figures you have given the jury won't you admit to me, you are on the stand under
269 oath, wasn't that an enormous price to pay for that work, the amount you have testified to?

A. I don't think so, no, under the circumstances, so many other things have come in.

Q. What else came in besides the cost of the work? What other expenses did you have?

A. There were a great many expenses.

Q. What other expenses did you include there?

A. All coming in and concerning this concrete?

Q. Yes, and when you told me that the fair price for concrete was seventeen or eighteen dollars, you told me that included everything.

A. Including everything in connection with the concrete. When you are doing a job like this there are a hundred things that you have to do and you have to pay for, which are not recognized.

Q. I think the jury would like to know what you have to pay besides labor and materials and overhead expenses, that is, salary of superintendent, etc.

A. There is insurance for instance. Frequntly you have got men down from the States I suppose that would come in our labor cost, I can't remember just now but there were a great many expenses.

Q. Then in this amount of $90,000.00 there was a great deal included besides labor and materials and salaries of superintendents, etc., was there?

A. There were expenses but all tending to get that work done.

Q. Well, what other expenses besides labor and material and salaries? The jury are entitled to know it because you are asking us to pay that money.

A. I can't say specifically anything definite now, but you know yourself in reference to doing a big work like this there are always lots of expenses.

Q. We are interested to know what they are because then we would know whether they were properly included, but I understand you to say that you can't tell what they were.

A. No.

Q. Now during the period that you have testified to as the period during which these amounts of money were spent, what other work on the building did the P. J. Carlin Construction Company have?

A. The setting of the steel and the laying of the brick.

270 Q. Setting the steel and laying the brick; how much did you deduct for setting the steel?

A. $1,500.00.

Q. And for laying the brick?

A. $3,000.00.

Q. Now in making those deductions how did you separate your labor cost between labor on the concrete and labor on steel?

A. We took a fair price per ton for setting the steel.

Q. You didn't keep separate payrolls did you?

A. No separate payrolls.

Q. So that when you got the figure on the steel work you took a fair price per ton for setting it?

A. All the labor was charged to wage account and then we took a fair price for setting the steel, ten dollars a ton, and deducted that.

Q. In other words, you took a fair price and deducted that instead of taking a fair price for putting in the concrete and deducting that to get the cost of setting the steel.

A. We took a fair price per ton for setting the steel and deducted it from the total amount.

Q. As a matter of fact, Mr. Oaksmith, let us get this straight, what you did was to take the total amount of expenditures between those periods and make a few deductions and charge us with the balance; that is what you did isn't it?

A. Yes, sir. The P. J. Carlin Construction Company had the contract for this whole building.

Q. When did you do the tile work on the roof of the building?

A. That was done the last part of it of course. No: done during this period but done afterwards.

Q. When did you finish your work on the building, Mr. Oaksmith?

A. I went away from here the latter part of 1913.

Q. And you said that the period covered by these expenditures was from March, 1913 to June 27, 1914, and the material from July 9, 1913, to June 24, 1914; were you away during the latter part of this period?

A. I think that is an error. If you will let me think whether it was 1913 or 1914.

Q. Go ahead, I don't want to get anything that is not your best recollection. I just want to ask you one question about that piece of paper, Mr. Oaksmith, isn't it a copy of the same piece of
271 paper that your counsel has used all through the trial.

Mr. Wait: I object to that. He can't know. He hasn't been in Court.

Q. Did you make that?

A. Not all of it.

Q. Did you help make it?

A. Yes, sir.

Q. Was that made after Mr. Carlin got down here in Porto Rico?

A. Some of it was; yes, sir. It was the latter part of 1913 that I had to leave here. I was right here in Porto Rico all the time.

Q. But you mean you left the job?

A. Yes, sir. I stopped my work on this building for the Carlin Company.

Q. When I asked you right at the beginning what periods these expenditures covered *and* you told me that the wages were between March, 1913 and June, 1914 and the material between July, 1913 and June 24, 1914; now is that right? Look it up and make sure.

A. Yes, that is right. It is a fact, that a large part of these expenditures were made and the entries made in the books after I left the job.

Q. So you were mistaken when you told us that you made all these payments and that you knew about making all these entries in the books?

A. Mr. Paine, those books were started by me and kept by me or under my supervision while I was here and continued by a man that I put there after I went away.

Q. But of course after you went away you didn't make any entries in the books or pay any money.

A. After I left here I could not.

Q. So that from the latter part of 1913 to June, 1914 you didn't make those entries in the books and you didn't make those payments.

A. Not personally.

Q. So really you don't know what they were, do you, of your own knowledge?

A. As much as any superintendent.

Q. We lawyers require a very high class of knowledge. You don't know of your own knowledge that those payments were made?

A. I am morally certain.

Q. You are morally certain because some friend of yours or some member of the company told you that.

A. The books were continued just as I started them.

272 Mr. Paine. In view of that testimony, your Honor, I now move that Mr. Oaksmith's testimony as to those totals be stricken from the record because there is no separation as to what he knew about and what he did not know about.

Mr. Wait: I am very much surprised myself. I didn't know anything about this. I should think that that portion after he went away would have to be strengthened if it is to stay in the record. We would have to have some evidence as to what the payments were. What was paid or disbursed by somebody else I should think would have to go unless the Court will strike it out subject to my connecting it up.

Mr. Paine: I won't take any more time. I am not trying to block my opponents from getting in anything that is proper.

The Court: The motion is granted. All the witness' testimony as to amounts and facts after he left the job the lat-er part of 1913 is struck out. There would be no possibility of connecting it up because he didn't know it. It would have to be independent testimony.

Mr. Paine: Just one or two more questions, Mr. Oaksmith.

Q. I just want to get accurately where this granite course that you claim was set out of level was located on the building.

A. At the southeast corner. It was the A course.

Q. Now that engine that you spoke of as burning out, where was that located at the time?

A. In Guerini's shed on the southeast corner.

Q. Now there was one thing you said about that. You said it took a month to get another.

A. That is my impression.

Q. You didn't mean that it delayed Guerini's concrete pouring a month, did you?

A. They attempted to mix by hand.

Q. Didn't they have more than one concrete mixer?

A. They had a little machine for mixing mortar for the outside walls.

Q. But they had a concrete mixer too.

A. That came very much later. This machine in
273 Guerini's shed was used for mixing concrete, about October, 1911 the motor burned out November 2d. 1911.

Q. But you didn't mean to tell the jury that it actually delayed the Guerini Stone Company's work a month on that account?

A. I meant to say that it delayed them very materially. I think it was three weeks or a month. One couldn't get a motor from the

Porto Rico Power & Light Company. While the motor was burned out, they did mix by hand.

Q. By the way, didn't the Carlin Construction Company mix all its concrete for the foundation by hand?

A. I don't know. The Guerini Stone Company had only one concrete mixer, that is all that ever I saw here.

Q. Now you spoke of taking a month to fix up the guy derricks, if that is the proper term, when did you spend that month fixing the derricks up?

A. The last few days of August and September.

Q. So that when these pictures were taken on the second of October they were all fixed up?

A. No, they are not completed.

Q. Those are guy derricks, aren't they (handing the two photographs in evidence to the witness)?

A. Guy derricks, yes. By the time the amount of granite that is shown on these pictures was on the job, the change was made to guy derricks.

Q. So you would not say that that change in the derricks delayed the Guerini Stone Company a month, would you?

A. If they had accepted the other derricks, they could have started much sooner, and they could have set this granite, which you see here.

Q. Provided they happened to have the proper pieces.

A. Yes, sir.

Q. Now I am going to show you a letter dated March 12, 1912, signed by the P. J. Carlin Construction Company, D. P. O., and ask you if you know who sent that letter.

A. Yes, sir; I sent that. I sent it to the Guerini Stone Company.

Q. Now you don't mean to take the position that you
274 never told the Guerini Stone Company to stop work about that time, do you?

A. What date is that?

Q. This is March 12, 1912.

Mr. Wait: He testified that he told them.

Mr. Paine: No, he was very careful to say that the Guerini Stone Company told him.

Mr. Wait: Yes, that was the very point, that we told them.

Mr. Paine: But you do admit that we were told.

Mr. Wait: Yes, we did but that you told us first. I think he testified that he notified them on the 13th.

Mr. Paine: That is all I want then with that on the record. That is all.

Redirect examination.

By Mr. Wait:

Q. Mr. Oaksmith, in connection with employing Guerini — a subcontractor, have you ever made any criticism of Mr. Guerini as a mechanic or artificial stone man?

A. No, he is very good at artificial stone.

Q. Was there any other person or party here who was competent to do this work, that you knew, except Mr. Guerini?

A. I didn't know of anybody around here. I presume that was the reason why he was employed. He had made here, some forms and moulds for this work.

Q. Is there any difficulty in steel erection; was there any on this building?

A. No, sir; no particular difficulty.

Q. Is there any difficulty in estimating and determining the cost of setting steel such as was used on this building?

A. No, that is quite simple.

Q. Isn't it always figured, the erection of steel in structures on walls like these by the ton?

A. Yes, sir.

Q. The American Bridge Company and other manufacturers or fabricators of steel do the erection at a unit price per ton, don't they?

A. I believe they are accustomed to. That is the universal form and custom. In laying brick it is the universal custom to lay bricks by the thousand. Brick are considered by the thousand. Fifteen dollars a thousand is ample price for laying brick such as are in these corridors. They were difficult bricks to lay.

275 A Juror:

Q. After you found out that the Guerini Stone Company was not to continue with the contract, how did you go about getting Mr. Guerini to do the work?

A. He looked up Mr. Carlin as far as I know and tried to get the job to go on with the outside walls.

Q. You didn't have bids on the work then?

A. Not on that particular work; I don't think. I didn't employ Guerini to do this work.

Mr. Wait:

Q. Mr. Oaksmith, did you furnish to the Guerini Stone Company, prior to May 22, 1911, engineer, coal, oil and services to run their derrick?

A. Yes, sir. I knew about it. I entered it in the books. I charged it daily. I paid the expenses.

Q. Do you know how much it amounted to?

A. Yes, sir.

Q. Have you got your papers there?

A. No, I haven't them here.

Q. Is this the sheet that you kept (handing a paper to the witness)?

A. Yes, sir. I kept an account of that from day to day during the time the Guerini Stone Company worked here. The aggregate of that was $541.22 net. That included no hire for either derrick or rental of the derrick itself.

Q. Does it figure the rental of either engine of either derrick?

A. It includes the rental of one engine, the second one.
Q. How much have you charged per day for one engine, the engine hire and rental?
A. Eight dollars.
Q. Is that a fair and reasonable price for the rental of the engine?
A. That is what we had to pay for them.
Q. And did you render that charge to the Guerini Stone Company while they were using it?
A. I told them from time to time what their amount was. And that was what we actually paid ourselves.
Q. Has any part, so far as you know, of that money, five hundred and odd dollars been paid to the Carlin Construction Company?
A. I don't know.
Q. It has never been paid to your knowledge here in San Juan?
A. No.

Mr. Wait: That is all.

Witness withdraws.

276 JOSEPH P. CARLIN, being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination.

By Mr. Wait:

I reside in New York city. I have connection with the defendant. I am President of the Carlin Construction Company, and have been President about three years. My age is about forty, and I have been in the building business since 1897. I am a graduate from the Polytechnic Institute of Brooklyn and Cornell University as Bachelor of Sciences and Civil Engineering. I have had charge of important works, among them the Bellevue Hospital, New York; the Naval Academy at Annapolis. The Naval Academy job amounted to a million and a half, and Bellevue Hospital about half a million; the Wingdale Prison about three million, the New York Edison Power Stations, seventeen in number made an aggregate value of I should say about five millions. The New York Telephone Company buildings, I should say amounting to about a dozen, value about three millions altogether. These twelve telephone buildings and the sixteen or seventeen power stations were built before I became President. They have been built since I came out of school.
Q. Just confine yourself to what you yourself know about and have been connected with and in what character.
A. The Brooklyn Institute of Arts and Sciences; The Carnegie Library, the Pennsylvania sub-station, New York Central sub-stations, New York, New Haven & Hartford Union station at Hartford. We are now doing a Court house in New York; we are doing several private residences and in Hartford the municipal building; the United States Government storehouses in Boston. The value of that is about $610,000.
Q. What elevated railway work have you done?

A. We are doing now the stations of the New York Municipal Railway and we have already done about half a million dollars' worth of work for the New York Municipal Railway.

Q. Those are the subways or the elevated railways of New York?

A. Yes, sir; also the Brooklyn Rapid Transit work. Our principal offices are at 1123 Broadway, New York.

277 Q. Did you have anything to do with negotiating the contract for this work here?

A. I did. I negotiated the sub-contract with Mr. Guerini. I had talks with Mr. Guerini before or at the time I gave him this contract. That conversation that you had was about the work here. It had to do with the manner and method or conditions under which it was to be done and it had to do with the description of the work itself .

Q. Mr. Carlin, I show you drawing No. 11, and ask you if you saw this with Mr. Guerini and if you went over it together.

A. Yes, sir. At the left side of that drawing there are lines to indicate whether or not that artificial stone is divided up into blocks There are no words there that say anything to that effect.

Q. I wish you would show to the jury and to the Court, if you will, what else seemed to show that that artificial stone was to be divided into pieces or blocks.

A. The imitation sandstone on the front which is exposed to view is shown pointed, also down here (indicating on the plan). The concrete work backing is shown in triangular marks such as these (indicating on the plan). These horizontal lines are the beds of the imitation sandstone, showing on the front. After the contract was signed, I went over that plan with Mr. Guerini. Mr. Guerini and I looked at those lines that I have described to the jury.

Q. What did Mr. Guerini and you say about it to indicate what they meant, if anything, both after the contract was signed?

A. Mr. Guerini said that it would be necessary to set the imitation sandstone with derricks, and asked me what length of boom we would send down there and we applied a rule to the plans, also indicated the positions on the plans as to where the derricks would be located so as to cover this building with two derricks, and decided that about a sixty-five foot boom would do the work. He said that he would also require space down here around about the building upon which to mould his separate stones for this work and that he could proceed with the moulding and the making of these stoens so that they could be cast considerably in advance of the time that they were to be set. Artificial

278 stone of that kind, which is to be cast in blocks, has to be cured before it is set. The time that it takes depends on the climatic conditions. The climate here requires about thirty days to cure. The full sized drawings for the work were not at that time entirely complete. The government undertakes to make some of the full-sized drawings and they are afterwards developed by the sub-contractor into what are called shop-drawings. Mr. Guerini made shop-drawings from the plans he had. I don't know whether they included this plan. He took them to Boston I believe, and sent the shop-drawings to us. The shop-drawings, as I recollect, showed

the separate stones jointed, i. e., the stones in the exterior of the building, the imitation sandstone.

Q. Was that merely and only the decorative part like the eagle and like the grills over the doors?

A. My recollection is that it included the entire exterior surface of the building. I saw the drawings and that is my recollection. The drawings that he sent us, I sent to the Supervising Architect at Washington for his approval. He returned the drawings together with a letter stating that the jointing shown on the plans was not the method or the intention of the original plans whatsoever; that we had misunderstood the intention of the government with respect to the exterior imitation sandstone work. They returned the drawings to us and we returned them to the Guerini Stone Company.

Mr. Wait: I offer in evidence Defendant's Exhibit 7, for identification, and if the Court please and if I may make the suggestion, may I have the defendant's exhibits marked A, B, C, so as to distinguish them from the plaintiff's?

The Court: Certainly.

Mr. Wait: Then I ask that it be marked Defendant's Exhibit A.

Mr. Paine: No objection.

The letter in question was then placed in evidence and marked Exhibit "A" for the defendant.

We sent a copy of that letter to the plaintiff.

(Mr. Wait then read Exhibit "A" to the jury.)

279 We returned those drawings to the Guerini Stone Company.

Q. Now, Mr. Carlin, you had conversations with Mr. Guerini about this; was there any doubt whatever in your mind about Mr. Guerini's idea of breaking up or cutting up this artificial stone into blocks and setting them.

A. Prior to this letter, no doubt whatever and I had the same idea.

Q. Now taking that in connection with your telegram of early date, of January 10th, Plaintiff's Exhibit 7, "Send bond for Porto Rico immediately, work must start at once," had you had any conversation with Guerini by which he or his company would understand what the telegram meant ?

A. I did, about the time of sending this telegram. Mr. Guerini came to our office and it was just after I had returned from Porto Rico, having arrived, I think, in New York on January 3d and before the time that these plans had been submitted to the government for its approval. I told Mr. Guerini of the conditions as I had developed them here. I gave him my prices as to sand and gravel and cement and disclosed to him what the local conditions were with respect to labor, as they had occurred to me. I also told him the space about the building was considerable and that generally the conditions were fair for him to start his moulding work. Mr. Guerini said that he wanted to start the work of moulding so as to be prepared in advance of the time when the foundations, that is, the

concrete foundations, and the granite would be up, upon which he could place his imitation stone work. He also said that he had had a great deal of experience in Mexico, where he had done considerable work and he had conducted a general constructing or construction business; that his wife had been very ill from lung trouble, I think, and was then in the north and he was very desirous to get her down here and start housekeeping and start general construction and also start the work on this building and be on the ground and on the job when the work was ready for him.

Q. Now coming right to this point of this telegram, what work had you and Mr. Guerini talked about or explained, if any, that was to be done, that you designated when you said: "Start work at once"?

A. The particular work of course was the detail drawings, the preliminary drawings which were necessary to be made before anything else could be done, before any moulds could be made. I mean the shop drawings. He made those in Boston. When he came to Porto Rico the work contemplated was the making of the necessary moulds for this cast stone work, i. e., to make them into separate blocks and set them separately.

Q. Now did you have a letter dated February 8, 1911, from Mr. Guerini?

A. I did, and I recognize that as his handwriting (handing a letter to the witness.)

Mr. Wait: I offer it in evidence.
Mr. Paine: No objection.

The letter in question was then placed in evidence, marked Exhibit "B" for defendant, and read to the jury by counsel.

Mr. Guerini came and I gave him a letter to my brother who was down here.

Q. I show this to you and ask you if that is a copy (handing a paper to the witness).

A. It is, and I gave this to Mr. Guerini to bring with him. He read it before he came, it wasn't sealed.

Mr. Wait: I offer it in evidence.
Mr. Paine: No objection.
The Court: No objection, the letter is admitted.

The letter in question was then placed in evidence, marked Exhibit "C" for the defendant, and read to the jury by counsel.

Q. I show you a letter of January 30, 1911; do you remember that letter?

A. I do.

Mr. Wait: I offer it in evidence.
Mr. Paine: No objection.
The Court: No objection, the letter is admitted.

The letter in question was then placed in evidence, marked Exhibit D for the defendant and read to the jury by counsel.

Q. What about this artificial granite?

A. The specifications for this work with the government, and the plans indicated the possibility of substituting for the natural
281 granite in the basement, an artificial granite to be composed of materials practically the same as for the imitation sandstone above, thus making it similar throughout on the exterior. There was an alternate in our contract to use natural or artificial granite.

Q. Did you have any conversation with Mr. Guerini or Mr. Converse in regard to using the artificial granite in place of the natural granite?

A. I had a conversation with Mr. Guerini in our New York office, about January 11th or 12th, just after this telegram. They wanted to know whether the artificial granite would be substituted for the natural granite, as he had made a proposal to substitute or rather to put this work in, the natural granite not being in his contract to furnish and to set. He said he would like to do that work. I told him that the government had not decided as yet whether or not it would avail itself of this alternative in the contract. I made application to the government to use artificial granite, and did urge it. The result was the Supervising Architect did not accept it. To get that settled, it took I think about a month or six weeks.

Mr. Wait: I offer in evidence the specifications referred to in the contract between the parties.

Mr. Paine: No objection.

The specifications in question were then placed in evidence, marked Exhibit "E" for the defendant.

Mr. Paine. I will simply make the statement that I am not objecting to the offer of these specifications in so far as they apply to work which was to be done under the contract between the plaintiff and the defendant. I simply make that statement to define my position on the record.

Mr. Wait. And I offer them intact and entire as printed by the government and as referred to in the contract between the parties.

Mr. Paine: I have no objection after having made my statement. I simply make it to make my position clear.

Mr. Wait: Here is the point, if the Court please, the United States Supreme Court seemed to indicate and to hold, I guess, that
282 the specifications applied so far as the work was concerned, and materials, but Justice Pitney seems to have held that the general conditions were not controlling, at least with respect to the suspension of the work, because there was a special clause in our contract which seemed to be contrary and held that the special clause of the contract between the parties governed over the specifications clause. Is that right?

Mr. Paine: That is putting it from one angle. What the Supreme Court held was that the contract between the Carlin Construction Company and the government formed no part of our contract, except so far as the specifications might be necessary to show how work

under our contract was to be done. For that reason I don't object to the specifications going into evidence, but if they were attempted to be used for any other purpose, I should have to object.

The Court: The specifications are admitted in the manner and the extent indicated in the Supreme Court opinion.

Mr. Wait: I think I will have to take an exception to that, Judge.

Q. Now, Mr. Carlin, when did you visit Porto Rico after Mr. Guerini came down here?

A. Not until about March 17th, 1912. I did conduct the correspondence with respect to this work with the plaintiff.

Q. I show you one letter of February 16, 1911, from the defendant to the Supervising Architect.

Mr. Paine: I shall object on general principles because it is a letter between the P. J. Carlin Construction Company and the Supervising Architect, and therefore is not binding on us.

Mr. Wait: By which we transmitted the drawings to the Supervising Architect, the Guerini shop drawings.

The Court: Let me see it.

(The letter in question is handed to the Court.)

The Court: The objection is overruled.

Mr. Paine: Note an exception.

The Court: The paper is admitted.

283 The letter in question was then placed in evidence, marked Exhibit "F" for the defendant, and read to the jury by counsel.

Q. Now what are setting plans, Mr. Carlin?

A. They are shop drawings showing the relation of stones one to the other with respect to their horizontal position and vertically. A shop drawing of the setting plan shows the entire course of stone throughout the building, each stone designated with the lines between them. That is the kind of drawings that Mr. Guerini furnished, that we sent to the Supervising Architect with this letter. I know Mr. Guerini's handwriting? This is his handwriting.

Q. Did you receive that or a similar one?

A. I have a similar one.

Mr. Wait: I offer it in evidence, exclusive of the pencil marks on there, which I believe are Captain Stierle's, the figures. I received it about, January 11th or 12th, 1911.

Mr. Wait: I will agree to typewrite it and furnish a copy to go to the jury. The pencil work has nothing to do with it. I only offer the part in Mr. Guerini's handwriting.

The Court: The paper is admitted, and the typewriten copy will go to the jury.

The document in question was then placed in evidence, marked Exhibit "G" for the defendant, and read to the jury by counsel.

Q. What was the contract price, if you remember, Mr. Carlin, of the Guerini Stone Company for this work?

A. It was $70,000.00 less seven and a half per cent, or $64,750.

Q. Did you have any conversation with Guerini at the time this was given to you?

A. He gave me one similar to that, which varied slightly from that. That $64,750 represents the price of the contract at which he was to do this work. It represents the quantities and the values that he put on them, and this exhibit is in his handwriting.

Q. Mr. Carlin, I show you a letter of July 21st from the
284 Guerini Stone Company to the defendants and ask you if you recall receiving that letter.

A. Yes, I recall it.

Mr. Wait: I offer it in evidence.

The Court: No objection, the letter is admitted.

The letter in question was then placed in evidence, marked Exhibit "H" for the defendant, and read to the jury by counsel.

Mr. Wait: I now offer a letter of September 6, 1911, from plaintiff to the defendant, being Exhibit 16, for identification.

The Court: No objection, the letter is admitted.

The letter in question was then placed in evidence, marked Exhibit "I" for the defendant and read to the jury by counsel.

Mr. Wait: I offer in evidence letter of September 16, 1911, being old Exhibit No. 18, at page 104 of the printed record.

The Court: if there is no objection, the letter is admitted.

The letter in question was then placed in evidence, marked Exhibit "J" for the defendant, and read to the jury by counsel.

Q. Now, Mr. Carlin, up to this time, September 15th, had you any notices, any statements, that you can recall, of any unhappiness on the part of the Guerini Stone Company, or any notice of any default on your part?

A. None that I recollect.

Q. Had the Guerini Stone Company in any way suggested to you, or any of its representatives, or intimated to you that they were going to throw down or give up this contract?

A. They did not.

Q. At or about this time had you or not received, or in August, a proposal from the Guerini Stone Company to do other work than was contained in their contract?

A. We had.

Mr. Wait: I offer in evidence Exhibit 9, for identification, letter from plaintiff to defendant under date of August 17, 1911.

285 Mr. Paine: The same objection. I object to it as immaterial, your Honor.

The Court: The objection is overruled and the paper admitted.

The letter in question was then placed in evidence, marked Exhibit "K" for the defendant, and read to the jury by counsel.

Q. Now, Mr. Carlin, what was this question of the jointing of the work?

A. Mr. Guerini brought up the question as to what should be done at the termination of each day's work. It followed from the fact that the government had decided that the building was not to be jointed all the way around the exterior above the first floor. Mr. Guerini insisted that it was impossible to finish a day's work without showing the result of it when the second day's work was put upon the first, and there was much correspondence between the San Juan office of Mr. Guerini and its Boston office and with us and with Washington as to just how this jointing should be made, or whether or not it might be eliminated altogether. This jointing above the first floor was never done by the Guerini Co. I refer to the concealing of joints and to the samples or methods which Mr. Guerini designed or devised and which had to be accepted by the government. I remember that samples were required for this work by the Supervising Architect at Washington to indicate the appearance of the finished work. The materials that would enter into the samples coming from Porto Rico would be different from samples coming from elsewhere. The resulting color we would obtain from the materials and the general effect of the finished surface was required to be known by the office at Washington, and therefore samples were needed. Samples were furnished for artificial granite first by Mr. Guerini. Samples of sandstone were furnished for the face of the building. They were furnished directly to Washington. Samples of artificial granite were furnished to us before they were furnished to Washington.

Q. Weren't samples of the beautiful sandstone here, furnished to you before they were sent to Washington?

A. I think there were some samples which were sent to
286 us in New York and were broken. It was probably about May of 1911. They came to us, I think, by express. Our office was then at Sixteen East Twenty-third Street, and when the box of samples was opened it was found that they were broken. They were not fit to send to Washington, in my opinion. We took it up with Mr. Guerini, there was some correspondence about it, and we directed him to take up the matter of the samples and the jointing with Captain Stierle who was then in charge of the work here at Porto Rico. That was with respect to concealing the joints, also the samples, were taken up with Mr. Stierle. I do not know whether Mr. Guerini sent any samples ultimately to Washington of my own knowledge. I know that Washington wrote to us that the samples as to the jointing had not been decided.

Q. I call your attention to April 15, 1911, and ask if you remember that you had a communication with respect to these samples at that time, that they were being made and they would be sent by the next steamer.

A. Yes, I remember that there was such a letter, and I remember that these samples were sent soon after. I don't know when the other

samples were sent to Washington. We got a letter saying that they would send them to Washington direct. I think it was some time after. The correspondence will speak for itself.

Mr. Wait: I offer in evidence letter of July 10, 1911, being Exhibit 11, for identification.

The Court: No objection, the letter is admitted.

The letter in question was then placed in evidence, marked Exhibit "L" for the defendant, and read to the jury by counsel.

That was with respect to the jointing or concealing the joints.

On July 10, 1911, our stiff-legged derricks had been sent but I don't think they arrived here, until a few days after.

Q. I show you Exhibits 12 and 13 for identification, dated respectively, December 12th and 14th.

Mr. Wait: I offer them in evidence.

The Court: These will be admitted in the same manner, that is to say, as evidence of notice but not as recitals of past events.

287 The two letters in question were then placed in evidence and marked Exhibits M and N, respectively, for the defendant.

Q. Mr. Carlin, did you know at this time that the entire balance of the granite with the exception of 100 pieces was cut at Providence?

A. For the building proper. I did. I know that of my own knowledge, I was in Providence. It didn't include the granite for either the east or west entrances, or for either of the two entrances on the north side nor for the approach on the south side; nor did it include the granite for the curbing around the general site. By entrances, I mean openings in the building permitting of entrance and exit. I mean that all of the granite that was not required for the building proper was what we called the entrances thereto; the steps, the cheek stones and the approaches.

The Court: Gentlemen of the jury, you will understand that these letters, as all the others that have been admitted, are admitted in this way. So far as those letters give notice to one side or the other claiming that they are at fault, or whatever it may be, that is legitimate. They go in for that purpose. But where the letter goes on to recite a whole lot of things that they say happened before that, that is not evidence. As it has been remarked in the case, it would enable the man who could write the best letter to win the case. They are admitted for the purpose of notice and not as to what happened.

Q. Mr. Carlin, I show you a receipt dated December 29th, 1910, signed A. Guerini. Do you know whether that is Mr. Guerini's handwriting?

A. I do. We received it from him.

Mr. Wait: I offer it in evidence. As it is so brief, may I read it into the record?

The Court: Yes.

Mr. Wait: "New York, December 29, 1910. Received from P. J. Carlin Construction Company one complete set of plans and specifications for the Post Office and Court House, San Juan, P. R. (Signed) A. Guerini."

288 The receipt in question was then placed in evidence and marked Exhibit "O" for the defendant.

Q. Mr. Carlin, have you estimated and figured the quantities of concrete on this building?

A. I have, and I have a memorandum of it. I figure the quantities of the different kinds or classes of work. This affects the quantities of the Guerini Stone Company, the concrete that the Guerini Stone Company was to have done under this contract. The concrete work was divided into three separate items; the walls, the artificial stone and backing, and the basement floor. The concrete walls amounted to 80,076 cubic feet; the artificial stone and backing 31,030 cubic feet; the basement floor 9,216 cubic feet, or an aggregate of 4450 cubic yards. I determine that myself.

Q. Now do you know with respect to this granite that was set here, how much it averaged per square foot?

A. I do. The ratio of the square feet of granite to the cubic feet of granite was as three is to two. The granite averaged a foot and a half in thickness, therefore a square foot of granite would be one and a half cubic feet of granite.

Q. Now, Mr. Carlin, do you remember that the Guerini Stone Company made applications to you for payments?

A. I do. The first application was made December 30, 1911, from San Juan by Mr. Follett. It was not itemized, but the amount was $5654. The next application was about two weeks later from Boston, January 16, 1912. It was not itemized, but the total was $10,000. The next was the next day, January 17th, 1912, not itemized and the total was $12,750. These were not for different days; they were all intended for the same proposal, the same application for payment. The next one was from Boston nine days later, January 26th, 1912, and that was itemized, $9,012. All of these applications were for the same payment. From December 30, 1911 to January 26, 1912.

Q. Now plaintiffs have put in evidence here, under date of December 30, 1911, an application for $5654.00, Exhibit 13, was that made on the application blanks that you provided?

A. I think it was. We did not pay any money on account of that. We did pay money to this plaintiff, on account of the last one of January 26, 1912; we paid it on February 2, 1912.

289 Q. Will you please state to the jury how you figured out or determined the amount that you did pay, if you know?

A. I know very well. Mr. Converse came to New York about February 2d and gave me the quantities, or else I had them about a week previous from his office, of approximately 343 cubic yards of concrete and 2500 square feet of granite set. I applied the unit of $10.00 a yard to this concrete, and forty cents a square foot to the granite.

Q. Why did you apply the price of ten dollars per yard to the concrete?

A. Because that was the price that was in our contract with the government for exactly the same work.

Q. Was it in your contract with the government or was it in your stipulation of the price that you sent to the Supervising Architect?

A. It was in the proposal which we sent to the government and which was copied into the contract finally.

Q. Now what was the price, if you recall, that you used?

A. It was ten dollars a cubic yard.

Q. Did it come out exactly that at the price you had bid or was that approximate?

A. It was approximate. The price in our contract was thirty-five cents a cubic foot and that amounts to $9.45 and I made it ten dollars a yard. I took the quantities that Mr. Converse submitted and applied these two prices of ten dollars per cubic yard and forty cents per square foot. We carried that out and deducted fifteen per cent because that was in the sub-contract with Guerini. It was provided that we should retain fifteen per cent. That made $3,765.50, and we paid that amount, by check.

Q. Had you statements of account from Porto Rico from your representatives of charges against the Guerini Stone Company for engine hire, engineer, coal and oil?

A. We had, but we did not deduct any part of those charges from this statement of account of Mr. Converse. We paid this amount in full as we deduced it from his quantities without any deduction whatever on account of charges that we had made against Guerini. The only deduction was 15%, and when Mr. Converse took this check, he asked me about the payments that we had received from the United States Government on this work and
290 I told him that those payments were all made public; that the Supervising Architect at Washington required that the superintendent in charge of each piece of public work should advertise and post publicly the amounts that had been paid the general contractor on the various parts of his work, so that it should be generally known what disposition was being made of the money and so that any one who was interested as a sub-contractor could find out.

Q. Was anything said about a price of $1.07 at that time?

A. There was. I told Mr. Converse that the government had been paying us for the work in the basement, for the concrete work already done, at the rate of $1.07 a cubic foot, but Mr. Stierle, who had been in charge of the work, had made a schedule of the total amount of concrete and had multiplied by this rate $1.07, but that was the rate that Mr. Guerini had given us for the imitation stone work above the first floor; above the granite, which is the first floor. Mr. Converse asked to see the schedule of amounts and the units and I sent for it and he got it and looked at it. In the meantime I had given him this check for this amount that I have testified to. Mr. Converse then asked me why he couldn't get $1.07 for his work and I told him because it was not worth it and that Mr. Berryman who had succeeded Mr. Stierle at this time had said to our repre-

sentatives that we had been overpaid $8,500 and that the next payment which was made to us January 31st, three days before this payment to Mr. Converse, he would deduct this amount of $8,500 and pay us for the concrete already in place at the rate of thirty-five cents and fifty cents and not $1.07, and that that had been a mistake on the part of Mr. Stierle. I did tell all of this to Mr. Converse.

Mr. Converse then said, could he have a copy of this schedule or so much of it as applied to this work, and I directed Mr. Lovering, our stenographer, to strike out the first four items, and those are the items to which Mr. Converse has testified.

Q. Did you tell him at that conference or at any conference that you would pay him for the work done by the Guerini Stone Company at the rate of $1.07 per cubic yard?

A. I certainly did not.

291 Q. Did you tell him that the government paid you $1.07 and you would pay him the same price for what he had done?

A. I did not. Mr. Converse must have misunderstood me.

Q. If you had paid him or had he been paid at the rate of $1.07 per cubic foot, how much money would he have received for the concrete alone if your quantity of 4,500 cubic yards is correct?

A. He would have received about $122,000.00. His contract price was about $65,000.00.

Q. Was the $8,000 or $8,500, more or less deducted from your next estimate?

A. It certainly was.

Q. And you were paid after that time at the rate of thirty-five cents for one class of concrete which the Guerini Stone Company had made up to January 25th, at that rate of thirty-five cents?

A. We were.

Q. Was anything else said at this conversation pertaining to this matter, that is, the conversation of February 1st or 2d between yourself and Mr. Converse?

A. There was. I referred to the fact that his contract contained an item of $6.70 a cubic yard for certain concrete work that was to be put in the walls of the basement and that was an option under the contract entered into between the Guerini Stone Company and ourselves. I insisted that $6.70 a cubic yard was the payment under that contract which ought to be applied to this character of concrete work that had been done. That is, that we had carried the concrete above the footings and up to the basement floor in the wall and that the Guerini Stone Company put their concrete immediately on top of that, exactly the same kind and the same nature as this concrete footing work, which if they had done it under the option that we exercised or might have exercised, the price for that would have been $6.70 per cubic yard. He said the option had not been exercised and that he considered that unit did not apply.

We later made another payment, of some six or seven hundred dollars; pretty close to $700. I was not present when that payment was made, but I know on what basis it was made. I afterwards saw the estimate and quantities and the prices applied to it. Mr. P. J. Carlin was present at the time that was paid, and Mr.

292 Converse. Mr. P. J. Carlin had not taken any active charge of this work. He came to make a payment of $675.

Q. Did you see the estimate and how it was figured out on the estimate that was paid, or the voucher?

A. I did. That was the basis of the payment and the amount of it. I have a memorandum of it.

Q. No, have you got the voucher or the estimate here?

A. I think it is in the papers that you have there, the requisitions for payments. Exhibit 18, dated March 9, 1912, but there was a pencil memorandum on it which I don't think is in that record.

Q. The total amount of concrete is 573 cubic yards, and the stone set 3,460 square feet; do you remember those figures?

A. I do.

Q. Do you know what price was applied to the cubic yards, 573, in arriving at this amount of money?

A. I do.

Q. Do you know what price was applied in the estimate or voucher to the 573 cubic yards?

A. I do.

Q. What was it.

Mr. Paine: Just a minute. Can I ask a question there, your Honor?

Mr. Paine:

Q. How do you know what price was used?

A. Because I saw it on the memorandum of the requisition for payment.

Q. And that memorandum was made by somebody else who did the paying?

A. It was made by Mr. P. J. Carlin.

Q. So your knowledge is obtained by reading what somebody else wrote.

A. Yes.

Mr. Paine: I object to it as incompetent, irrelevant and immaterial and not binding on us and it is not of the witness' own knowledge.

Mr. Wait: It is of the witness' own knowledge because he saw the estimate and the voucher and how it was prepared and the quantities and prices. I want to show how this $674.00 that Mr. Converse came to the office and got, was arrived at.

The Court: Who made the estimate?

293 Mr. Wait: It was made between Mr. Converse and P. J. Carlin, the father of Mr. J. P. Carlin.

Mr. Paine: Unless it is shown that Mr. Converse signed that, it would not be binding on him.

Mr. Wait: Mr. Converse has testified that he received the money and I want to show how it was arrived at.

The Court: The objection is sustained unless it is shown that that memorandum was signed by Mr. Converse or addressed to him.

Mr. Wait: Only in the manner that he received the amount of it.

The Court: As I understand, Mr. Converse got a check and there is nothing in the case showing that Mr. Converse made that estimate or assented to that estimate.

Mr. Wait: The estimate of quantities was submitted by Mr. Converse in his Exhibit No. 19. The prices which were applied to those quantities and which produced the check of $674.00 more or less, do not show in this Exhibit which they have put in. Now there was something omitted from this estimate to arrive at the amount of money, and I want to supply it.

The Court: The objection is sustained.

Mr. Wait: Note an exception.

Q. Did you ever have any more conversations with Mr. Converse about that payment of $674.00 more or less?

A. Oh, yes, we had conversations about it.

Q. Did you ever tell Mr. Converse how your father arrived at that amount of money?

A. I did. He knew how he arrived at it.

Q. Did you discuss it with him?

A. I did.

Q. What did you tell him?

A. It was, I should say, about May 1st when Mr. Converse came down from Boston. It was prior to May 22d, and subsequent to March 17th. I told Mr. Converse that the unit of $6.70 had been applied to his quantities, repeating the conversation that we had before that the $6.70 was in his contract with us and that
294 my father had applied that rate of $6.70 because it was in the contract for a similar kind of work, and that the price of forty cents was without a question in the contract.

Q. Did your father know that you had allowed Mr. Converse on the previous application ten dollars a yard?

A. I think he did.

Q. But he applied the contract price as he read it in the contract, as $6.70, did he?

A. He did.

Q. Was the full amount of the estimate with these prices applied, less than 15% paid to Mr. Converse?

A. It was. No deduction was made on account of engine hire, engineers, coal and oil used here at Porto Rico, except the fifteen per cent retained. The bills of the Guerini Stone Company were accumulating down here during that time up to March 9th, 1912, they were coming to our office from month to month. It is the contention of the P. J. Carlin Const. Co. that they paid in full practically pursuant to their contract with the Guerini Stone Company. There were some charges with the Guerini Stone Co., that we had against it, as you have just mentioned here, and there was an apparent balance of some $300 or $400 *dollars* that they had after this application of March 9th.

Q. Now had you, Mr. Carlin, or your company ever expressed any satisfaction of this work that had been done down here by Mr. Guerini?

A. We certainly had not.
Q. Had the work been done entirely to your satisfaction?
A. It had not.
Q. What reports had you received which were reasons for your not expressing your satisfaction or being satisfied?

Mr. Paine: I object to the contents of the reports. It seems to me that the only way—far be it from me to suggest, but if this is to be gone into it has got to be gone into as a claim of Mr. Carlin.
The Court: The objection is sustained.
Mr. Wait: Note an exception.

Q. Now, Mr. Carlin do you know when the stiff-legged derricks were sent down here to Porto Rico?
A. I do. They were sent down about July 7th, 1911.
295 Q. What kind of derricks do you use as a builder for setting granite, placing concrete and placing steel on such a building as this?
A. We use stiff-legged derricks, guy-derricks, jinny-winks, breast derricks; for setting granite, a stiff-legged derrick.
Q. Did you send down these stiff legged derricks for the purpose of doing this work down here?
A. We did.
Q. After the Guerini Co. quit the work, did you use the guy derricks or did you get different derricks?
A. We used the guy-derricks for a little while, for the balance of that floor; then we dismantled the guy-derricks after a little more of the steel had been set and then used the jinniwink and the stiff-legged derrick. We found the guy derricks objectionable and that is why we took them down.
Q. Now, Mr. Follett in his testimony said the stones had to be set and placed by the derrick and also the concrete had to be swung by the same derrick and placed in the forms and when we only had one derrick it made practically half speed. Did you ever in your life see two guy derricks used, one for setting granite and another for backing it up, in the same place?
A. I never did, no. It could not be possibly done with guy derricks, because the guy derrick would operate over one area and within that area it would have to set the granite and place the concrete. Two guy derricks could not be used because two objects can't occupy the same space at the same time. If you have *noe* guy derrick placed with its guys surrounding the mast, it would be impossible to place another derrick within that circle without conflicting with the swinging of the boom, and the guys from the other derrick would also interfere, one with the other; it would not be practical. It would not even be possible. The boom of the one derrick certainly would constantly intermingle with the guys and boom and the rigging of the other derrick. I never did see such a rig in my life. We had two boom derricks here, one on the eastern end of the building and the other on the western end. That is the way a building is always erected when we use guy derricks.

Q. Mr. Carlin, the question has been raised briefly as to
296 the repair of the foundation here. Did you do that work?
A. We did, and we were paid for it by the government, $36,000.00.

Mr. Wait: I offer in evidence letter of April 3, 1912, from the defendant to the plaintiff being old Exhibit No. 46 of the record.
Mr. Paine: No objection.
The Court: No objection, the paper is admitted.

The letter in question was then placed in evidence, marked; Exhibit "P" for the defendant, and read to the jury by counsel.

Mr. J. P. Carlin is myself and I wrote this letter. I delivered it to Mr. Follett, here on the work. It was true at that time that we nad endeavored to use the Guerini Stone Company's employees on our work. They offered to let us use them and charge ten per cent above the wages we paid them. When we had them and employed them on our work we expected to keep their time and pay them. That was the programme. They wanted to charge us ten per cent additional.
Q. Is that what you meant in this letter by saying; We are ready now to use these men, but can see no reason to pay you a percentage on their wages?
A. It was.
Q. And did you offer to take these men and employ them and use them on your work and thus save the loes and damage to these plaintiffs while this work was stoppd?
A. That is what the letter says and that was what I intended. They did not leave their men here for us to use while this investigation was pending. They sent most, if not all of them back to New York or Boston.
Q. I show you one letter dated May 31, 1912, from the plaintiff to the defendant.

Mr. Wait: I offer it in evidence.
The Court: No objection, the paper is admitted.

The letter in question was then placed in evidence, marked Exhibit "Q" for the defendant, and read to the jury by counsel.

297 Mr. Wait: I offer in evidence letter marked 4 for ident.

The letter in question was then placed in evidence marked: Exhibit "R" for the defendant, and read to the jury.

Mr. Wait: I offer in evidence Exhibit 3 for ident., dated December 6, 1911.
Mr. Paine: No objection.

The letter in question was then placed in evidence, marked Exhibit "S" for the defendant, and read to the jury by counsel.

Q. Mr. Carlin, does this refer to Mr. Guerini's going to Washington?

A. It does.
Mr. Wait: I offer Exhibit 5 for identification.
Mr. Paine: No objection.

The letter in question was then placed in evidence, marked: Exhibit "T" for the defendant, and read to the jury by counsel.

Q. Now, Mr. Carlin, is this one of the things about the discrepancies in that letter?
A. That was the thing that all you have been talking about, refers to.
Q. And was this one of the things that Mr. Guerini went to Washington with?
A. That was what started the investigation in Washington.
Q. Did you ever bring it to the attention of Washington?
A. We certainly did.

Mr. Wait: I offer Exhibit 6 for identification letter of November 22, 1911.
Mr. Paine: No objection.

The letter in question was then placed in evidence, marked: Exhibit "U" for the defendant, and read to the jury by counsel.

I offer in evidence Exhibit 15 for identification.

No objection, and the same was placed in evidence, marked: Exhibit "V" for the defendant, and read to the jury by counsel.

Q. Now, Mr. Carlin, did you ever have any conversation or
298 any talk with any member of the Guerini Company in which you agreed to furnish more than one engine or said you would furnish more than one engine?
A. I never agreed to furnish more than one engine.
Q. Did you ever make any agreement that you would erect the derricks or say that you would do it?
A. I never did. We did erect them. Mr. Guerini and his men did not help.

Mr. Wait: I offer letter of October 21, 1911.

No objection and the same is placed in evidence and marked: Exhibit "W" for the defendant, and read to the jury by counsel.

Mr. Wait: I offer in evidence letter of February 5, 1912.

No objection and the same is placed in evidence, marked Exhibit "X" for defendant, and read to the jury by counsel.

Witness: I came down here March 18th.

Mr. Wait: I offer in evidence letter of February 26, 1912, from plaintiff to defendant.

No objection and the same is placed in evidence, marked: Exhibit "Y" for the defendant, and read to the jury by counsel.

Witness: I came down here March 18.

Mr. Wait: I offer in evidence letter of February 26, 1912, from plaintiff to defendant.

No objection, and the same is placed in evidence, marked: Exhibit "Y" for the defendant, and read to the jury by counsel.

Mr. Wait: I offer in evidence letter of Feb. 28, 1912, from defendant to plaintiff.

No objection, and the same is placed in evidence marked: Exhibit "Z" for the defendant, and read to the jury by counsel.

Q. Mr. Carlin, was this the last shipment of the reinforcing steel?
A. It was; all the other reinforcement had been sent before that, and it had been here from Nov. 1911, up to Feb. 28, 1912. We sent no more reinforcing steel for the Guerini work.

299 Mr. Wait: I offer in evidence letter No. 14 for ident. of Dec. 29, 1911.

No objection and the same is placed in evidence, marked: Exhibit "AA" for the defendant, and read to the jury by counsel.

Mr. Wait: I offer in evidence Exhibit 10 for ident. old record page 99, letter of June 20, 1911.

No objection and the same is placed in evidence, marked: Exhibit "BB" for the defendant, and read to the jury by counsel.

Mr. Wait: I offer letter on page 102, Exhibit 14, old number.

No objection and the same is placed in evidence, marked: Exhibit "CC" for the defendant, and read to the jury by counsel.

Mr. Wait: I offer letter on page 108, Exhibit 26 old number, of Oct. 28, 1911.

The letter was then placed in evidence, marked Exhibit "DD" for the defendant, and read to the jury by counsel.

Mr. Wait: I offer the next Exhibit of Nov. 14, 1911.

The letter in question was then placed in evidence, marked Exhibit "EE" for the defendant, and read to the jury by counsel.

Mr. Wait: I offer the next letter in the printed record, of November 18, 1911.
Mr. Paine: The same objection and an exception.

The letter in question was then placed in evidence, marked: Exhibit "FF" for the defendant, and read to the jury by counsel.

Mr. Wait: I offer the next letter, November 18, 1911, too.

No objection was made to the offer of this letter and the same was placed in evidence, marked: Exhibit "GG" for the defendant and read to the jury.

Mr. Wait: I offer the next letter, of Nov. 21, 1911.

The letter was then placed in evidence, marked: Exhibit "HH" for the defendant, and read to the jury by counsel.

300 The Court: Gentlemen, the same as to this letter that I told you as to the others. It is quite hard to distinguish. A letter that makes a complaint, that has its value in a case of dispute but where it recites a whole lot of back transactions, it is not evidence of anything. It might be made up. I do not say that it is in this case, but it might be made up, so I think it is the best plan to let them go in with that caution. In looking over these letters don't pay any attention to recitals of past events.

Mr. Wait: I offer in evidence letter of January 24, 1912, page 37, from defendant to plaintiff.

No objection and the same is placed in evidence, marked: Exhibit "II" for the defendant, and read to the jury by counsel.

Mr. Wait: I offer in evidence letter of Dec. 4, 1911, from the plaintiff to the defendant.

No objection and the same was admitted, marked: Exhibit "JJ" for the defendant, and read to the jury by counsel.

Mr. Wait: I offer letter of Dec. 19, 1911, page 114, from the Carlin Company to the plaintiff.

No objection and the same was admitted, marked: Exhibit "KK" for the defendant, and read to the jury by counsel.

The Court: That letter is considered in the same way. Where it says what is going to happen afterwards is not evidence at all of course of that, the arrival of the stone, for instance.

Mr. Wait: On page 116, I offer the letter of Feb. 3, 1912.

No objection and the same was admitted, marked: Exhibit "LL" for the defendant, and read to the jury.

Mr. Wait: On page 121, I offer in evidence letter of May 31, 1912.

No objection and the same is placed in evidence and marked: Exhibit "MM" for the defendant, and read to the jury by counsel.

301 Mr. Wait: Now, I would state, if the Court please, if I may, that I treat that as a notice under the clause of our contract which provided that for failure or neglect to prosecute the work, we must give notice that we will do it at their expense. There is a three days' notice provided for in the contract.

I offer letter of March 20, 1912, page 128.

Mr. Paine: This seems to be a letter to the Supervising Architect in Washington, signed by Mr. Heald, who is not a member of our company or of the defendant company, either of them, and therefore of course it is not binding on us. And in addition to that it is a communication to the Government at Washington with regard to the situation between the Government and the defendant, with

which we have nothing to do, so I object to it as incompetent, irrelevant and immaterial and not included in the pleadings and not binding on us. It is a letter from the Government's Supervising Architect on the work to the Supervising Architect with respect to the work here and with respect to the investigation.

Mr. Wait: This work was to be done under the direction and to the satisfaction of the Supervising Architect and this man represents the Supervising Architect here and this is a report from him and represents his directions and his satisfaction or dissatisfaction with the work.

Mr. Paine: It refers to the foundation work with which we had nothing to do. It all goes into the question of responsibility between the Government and the defendant, in which we are not interested, in which the Court is not interested nor is the jury interested in this case.

The Court: Let me see the letter, please.

(The letter in question is handed to the Court.)

The Court: The objection is sustained.

Mr. Wait: Note an exception.

For the record, defendant now gives notice to the plaintiff
302 that this letter is offered to meet the persistent remarks of counsel for the plaintiff that the foundation collapsed or that it sank and numerous other reflections which have been made throughout the trial, and if these remarks are continued in summing up before the jury, it will be the subject of a motion by defendant's counsel after having excluded this letter. In other words, if the Court please, I insist that no reflection shall be cast upon the defendant that these foundations or the things that happened to them or was done to them thereafter was the fault of the defendant, if my friend is going to exclude it.

Mr. Paine: I have an objection to register, your Honor. This is all for effect. My friend is trying to convey the impression to the jury that the defendant was not responsible. I am willing to admit that that question is entirely out of the case; that the question as to the fault between the defendant and the Government is not before us. That is the attitude I intend to adopt, but the effect of my friend's remarks of course was that I was afraid to have him go into it. I will recall "collapse" and use Mr. Berryman's expression, which was "sank" sank or settled.

The Court: The stenographer will note the agreement of counsel.

The letter just offered and excluded is marked No. 17 for the defendant for identification.

Q. Now, Mr. Carlin, after May 22, 1911, when the plaintiff quit the work here, did you secure any proposals or estimates for the completion of the Guerini Stone Company's contract?

A. We did. We secured such a proposal from Purdy & Henderson, a firm of engineers located here in San Juan and who were doing a very great deal of work in the West Indies and who came

originally from Chicago and were still conducting extensive operations in the United States. They built here the Y. M. C. A. building, the Royal Bank of Canada, the Ponce pier and two or three other contracts of similar size. They were familiar from
303 their operations at the time they gave you this proposal, with the prices in San Juan. They had done work of this character and large quantities of it. They were an established firm of reputation. We gave them the Government specifications and information about this contract that the Guerini Stone Company had here and they inspected the building to see how much had been done. They made us a proposal of the cost or estimate of what they would do the work for. That was made in good faith and bona fide.

Q. I show you a letter of July 24, 1912, from Purdy & Henderson to the P. J. Carlin Construction Company and ask you if that is the bid or estimate that you received.

A. It is a copy of it.

Mr. Wait: I offer it in evidence.

Mr. Paine: I object to the admission of an unaccepted bid as evidence of the cost or value of doing work. This was offered at the first trial. It was a bid for doing this work which was not even accepted by the defendant, and in support of my objection I cite 191 U. S. 341.

The Court: What does that hold?

Mr. Paine: "It is of a nature entirely too uncertain shadowy and speculative to form any solid foundation for determining the value of the land which is sought to be taken in condemnation proceedings. If the offer were admissible, not only is it impossible to prove the lack of good faith in the person making the offer but the circumstances of the parties at the time the offer was made as bearing upon the value of such offer may be very difficult, if not impossible, to show * * *. In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication and even dangerous in their character as evidence upon this subject."

Mr. Wait: That sounds very good, and had the defendant pursued the policy and the plan outlined there I think I would have followed him, but he has put an interested witness, the plaintiff
304 in the case, on the stand and has had him give an estimate of the value of the work upon which he prefaced damages against the defendant. It is nothing but an estimate and it was so stated. Now, here is an estimate which a man puts his name to and offers and agrees to do this work at that price and makes a bona fide proposal. No better evidence could be had than to go to one of the best and foremost builders in the continent and get him to say what he would do that work for. It seems to me it is the best possible evidence of the fair and reasonable cost of it.

The Court: The objection is sustained.

Mr. Wait: Note an exception.

Mr. Wait: I now renew the offer, if the Court please.

Mr. Paine: I renew my objection.

The Court: The objection is sustained. As I understand it, the offer was not accepted and was not carried out.

Mr. Wait: Oh, no.

The letter is marked: 18 for defendant for identification.

Q. Mr. Carlin, was this bid invited and the proposal sought and received with a view of carrying out this work with Messrs. Purdy & Henderson?

A. It was.

Mr. Paine:

Q. Again let me inquire, were you down here when this bid was made?

A. I was.

Mr. Wait:

Q. And it was requested and sought for the purpose of securing this work done on behalf of the Carlin Construction Company or for it?

A. It was.

Mr. Wait: I take it that this was not rejected because it was not signed and sealed and attested.

The Court: No, because it was not accepted and not carried out.

Q. Mr. Carlin, do you know what are the relative values or costs in construction of concrete such as was put in the basement from the basement floor up to the first floor as compared with the artificial sandstone above the first floor in this building?

A. I do.

305 Q. What are the relative values based upon the cost of such work?

A. It would be about as three to one. The imitation sandstone is the more expensive. The estimated value of 35 cents and $1.07 was put upon it by the Government inspector and estimator.

Q. And was that the price that was paid to you for it in their estimates, relatively?

A. It was. At the time that we completed I did the work here of the Guerini Stone Company. I was Secretary and Treasurer of the defendant. I handled the money at New York for this job.

Q. Do you know what you paid to complete the Guerini contract after the plaintiffs stopped on May 22, 1912?

Mr. Paine: I object on the ground that the witness is not properly qualified, it is hearsay and no proper foundation, and incompetent, irrelevant and immaterial.

Mr. Paine:

Q. Did you pay these bills direct or did you send money to Mr. Oaksmith or whoever was in charge down here?

A. We sent the money from New York to Porto Rico. We sent it for materials pretty generally to people from whom we bought.

Q. Did you pay the bills in New York?
A. We paid the material bills.
Q. Do you know what proportion was paid in New York?
A. Pretty much all the material bills were paid in New York.
Q. As to the payrolls how did you pay those?
A. The payrolls were paid here on requisitions sent to New York.
Q. That was all sent by remittances by you from New York to somebody here who paid the men so that you had nothing to do with that?
A. The money came from New York here and was paid here.

The Court: The objection is sustained as to payroll.
Mr. Wait: Note an exception.

Mr. Wait:

Q. Do you know or have you got a record there of what you paid for materials?
A. Yes.
303 Q. How much did you pay for materials from the New York office?
A. That is what I was going to give, in a lump sum.

Mr. Paine:

Q. You haven't vouchers here but simply a lump sum?

Mr. Wait: What was that taken from, Mr. Carlin?

A. From the ledger and journal. The books are in New York; the copies are here. It is not itemized except as to labor. It shows in the books we have got here in Porto Rico.
Mr. Lovering is in New York, he kept the books. He kept the books during the period that Mr. Oaksmith was doing general contracting here for himself. That was for the period to which he testified. These were items that I have taken from our books. These books were kept in the regular course of business here. I have tested them from time to time in paying bills; as treasurer, I had to test all the accounts. I have disbursed all the money, during this job after Mr. Guerini quit on May 22, 1912, as treasurer of our company. The quantities or payment which I have, were taken from these books. I have found these books always correct in handling them and our bills have been paid in accordance with them. Our accounts have been met by checks here. The payrolls have been paid, and the money been drawn on requisitions which contained those payrolls. The money was sent down from New York to anticipate the payrolls. Then the payrolls were subsequently made up and sent in voucher system to account for the money. The vouchers and payrolls were filed with me as treasurer, and the money was accounted back to see if it equalled. That was done by our book-keepers in New York. I know it was done.
Q. Did you give it your personal supervision to see that it was done?
A. I had to check the accounts on this particular job.

Q. Where did you get these amounts here that you started to read?
A. From the ledger and journal here in Court. The balances are shown in those books. I can pick them out of the books.
Q. Is this the ledger and journal which you speak of, (exhibiting books to the witness)?
A. Yes.
307 Q. I ask you to take from the ledger the total expense on account of this Guerini contract of materials and labor?

Mr. Paine: Again, I object on all the grounds that I have raised before. Before I make that objection, I would like to ask one or two questions.

Mr. Paine:

Q. You have no personal knowledge, have you, Mr. Carlin, as to what men received this money that you claim was paid for labor?
A. Do you mean the names of the men?
Q. Yes.
A. I have.
Q. No personal knowledge that so much money was paid to each man.
A. I was not here.
Q. You were not here when the materials were bought.
A. Not when they were delivered here. I was in New York. Most of them were bought in New York.
Q. As to the materials bought here.
A. No.
Q. In this total you can't separate it by giving the total of the items that you personally knew were paid here and the items that you don't personally know.
A. I could not separate them, but I know what materials went into the work because I was here quite often.

Mr. Paine: I renew my objection, your Honor. A corporation's books are not evidence themselves.
The Court: Are the books in evidence?
Mr. Wait: I will offer the books to substantiate it if my friend wants me to or I will have them marked for identification for his use.
Mr. Paine: It is attempting to make the books of the corporation serve defendant as evidence in its favor of payments which under the most elementary rules must be proved by the people who made the payments.
The Court: If the books are not in evidence the totals from the books cannot be offered.
Mr. Wait: I offer the books.
Mr. Paine: I object to the books on all the grounds that I made to the question.
The Court: As I understand it, these are the books that Mr. Oaksmith testified to that he kept.
308 Mr. Wait: They are the books of the P. J. Carlin Construction Company by which their accounts and bills were

paid here, but they were not kept all the time by Mr. Oaksmith. I am advised that the rule down here is somewhat different from what it is in the states under the common law, but how different it is, I don't know, I am ignorant, but I know what it would be in a Court of law.

The Court: The books will be admitted for the periods that Mr. Oaksmith testified to that he kept them himself and any questions on that will be admitted, not after that.

Mr. Wait: That is our rule in the states at common law. I confess that. If there is no different rule here, I take an exception pro forma, if the Court please.

Mr. Dexter: Will Mr. Wait permit me to make a statement? I would ask your Honor to consider the feature of this testimony, not so much the value of the books and their contents, but the purpose of the books to enable the witness who is now testifying to testify that the money shown by these books was paid out in good faith for this work for labor and materials. Certainly we ought to have a right to do that. Then, on the other hand, the plaintiff can show if he can, that we paid too much, that we were extravagant, that we didn't expend the money properly, but this witness testifies that in the regular course of business they paid the amounts shown in these books. Now in ordinary business dealings and social intercourse a presumption exists that until shown otherwise, the books must be accepted, and the accounts there, as made in good faith. Now the good faith of the company's books has been proved by the testimony of Mr. Oaksmith. He testified how he opened the books and how he left them to a trusted employee of the defendant company, and Mr. Carlin, the president of the company and the treasurer, testified that all the entries in the books and all of the
309 accounts therein are supported by the ordinary and usual course of business existing between the employees of the company and the head office and that every item in those books is supported by vouchers. Whilst he cannot say that five dollars was paid to Juan Pedro or Jack, he knows from the reports made in the ordinary course of business that certain amounts of money were paid to a given determinate number of employees from time to time, and these vouchers passed through the possession of the witness. So it seems to me the witness ought to be permitted to use those books which are the books of the defendant company, not the books of Mr. Oaksmith alone. They are the books of account, of the defendant company, just like in a controversy between a citizen and a bank, the bank's books being of an impersonal character, ought to be allowed to be used, when they are properly kept, to prove the operations of the bank, and that is why I respectfully and earnestly urge upon your Honor to allow this witness to use these books as to the transactions and operations of the defendant company. Now, then, if the amount developed in those books and in those accounts should appear to plaintiff or his counsel to be extravagant, that they can meet by rebuttal testimony.

Mr. Wait: I have one point in view. Just before I came down here I ran across a case which held that under a contract where

there is a provision that if the sub-contractor failed, refused or neglected to do the work and it is completed by the general contractor for his account, that he does not have to go into the record to the extent of proving the cost as of an account, but that he can prove the money that he actually disbursed.

Mr. Paine: I appreciate fully the eloquent plea that Mr. Dexter has made to have these books offered in evidence. I am not responible for the rules of evidence, but the law is absolutely clear that
310 these books are not admissible. It would be unfair, in addition to the strict rule of law, your Honor, because I was showing from Mr. Oaksmith that any such amount was not a fair and proper expenditure to complete this contract, and that examination was terminated by reason of the fact that the books with regard to this particular were excluded and his testimony was stricken out, and he is gone and that subect is over. Now, I can only stand on my rights and, as counsel has admitted, under the rules of evidence, those books are not admissible.

Mr. Wait: I don't want any error in this case Judge and in proving an account strictly under the ordinary rules of a grocery account in the states under the common law, I should agree with the Court's determination as regards the admission of the books, and I am frank to say so. I don't wish to take any advantage of the Court or of the jury, but as Mr. Dexter has stated to the Court, I still think that Mr. Carlin with these books could testify as to the amounts disbursed; they might be used for that purpose.

Mr. Paine: If the offer is made that way, I will change my objection.

Mr. Wait: The point now, of course, before the Court is the offer of the books.

The Court: I think the ruling made is correct. The use that these books are being put to is to show that the defendant paid out certain sums of money which are chargeable against the plaintiff. That is the object of the testimony if it belongs in the case at all. The witness paid out certain sums of money, but personally he does not know where it went, to whom it went, or rather he does not know the connection of the parties with this particular job. He sought to introduce the books in order to supply that missing link, to show that he paid out what the books showed was a proper list of payments connected with this job, so far as relates to the
311 plaintiff. Now, that makes it necessary that the books themselves in some way be proved up as proper evidence in the case. The books are the books of the defendant, not of the plaintiff, and so they can be admitted on due proof. What is due proof to bind the plaintiff? It is the testimony of somebody that kept these books, who knows the amounts put down in there were correct. Mr. Oaksmith has testified for a certain period and for that period I think the books are legitimate evidence and are admissible. It seems that somebody else kept them after that, and Mr. Oaksmith, who was a witness, simply knows that they were kept so far as his knowledge went, but the keeping of the books was not by him or he was not responsible directly for their keeping. So while the

books would be admissible if this particular missing witness were put on the stand to prove the books, he is not here and I think there is a lack of evidence as to the books, that is to say, after the time that Mr. Oaksmith could testify. I think the ruling is correct. The objection is sustained.

Mr. Wait: Will the Court kindly grant an exception?

The Court: Certainly.

Q. Mr. Carlin, while you were prosecuting this work down here, do you know the aggregate amount of money that you sent here to this job while the Guerini contract was being carried on, and what you paid out for materials?

A. Yes, I know.

Q. How much money did you send down here to Mr. Oaksmith and expend for materials for this work here of the Guerini Stone Company, and including the laying of the brick and the setting of the steel, and while that work was in progress what money did you disburse here or send here for disbursement?

Mr. Paine: I renew my objection and add the ground that the witness said that he had no personal knowledge of how much money was spent on the Guerini Stone Company's work, what it
312 was spent for or whether the things that it was spent for were proper or necessary in connection with the work to be done.

The Court: The objection is sustained.

Mr. Wait: Note an exception.

The Court: Gentlemen, let me add to what I said about the books, there are certain stringent rules here in Porto Rico as to what books shall be kept and how they shall be kept and their evidential value. There is no evidence that these books were kept according to any such system and I take it they were not. They were simply books kept by an American firm doing business in Porto Rico and with no special regard to Porto Rican law. They were not for instance vised by a magistrate, so I take it that the Porto Rican law does not apply. And, furthermore, as I have had occasion to say in a number of cases, I am not sure how far the Porto Rican law would apply as a matter of evidence in the Federal Court, so I am not construing the Porto Rican law in this connection.

Q. Mr. Carlin, do you know whether these books were certified by the off-cer here, the Mayor or the Governor or somebody, under the Porto Rican law?

A. I know they were not.

Cross-examination.

By Mr. Paine:

Q. Mr. Carlin, at the beginning of your testimony you testified to an interview with Mr. Guerini when you went fully, you said, into the question of making moulds for the purpose of shaping

stone to go into the exterior walls. You didn't say anything about that in your testimony at the first trial of this case, did you?

A. I don't recollect the testimony of the first trial. I have no recollection of giving that testimony at the first trial.

Q. Now, you also said something about this question of whether or not the walls should be constructed of stones cast on the ground, artificial stone, or whether they should be poured in place. I
313 understood you to say that that question was all settled and determined by the Government by letter dated February 28, 1911; is that correct?

A. That was correct as to those misconceptions on the part of Mr. Guerini and myself.

Q. So that on and after February 28th, 1911, there could be no confusion and no delay on the part of the Guerini Stone Company from that cause, is that true?

A. That applied to the question of casting the stone separately, that is correct.

Q. Now, about the time that Mr. Guerini came to Porto Rico, Mr. Converse came to Porto Rico, too, didn't he?

A. I think he did. He had a talk with me before leaving, not immediately before, but some time before leaving. He discussed the fact that he was going to Porto Rico.

Q. Did you at that time say anything to Mr. Converse, when he spoke about going to Porto Rico, about this misunderstanding, or did you state to him how the exterior walls were to be constructed?

A. He was not at that time acquainted with the plans and he was introduced to me by Mr. Guerini as the financial agent and he was coming down here to find out about the work. I know that he was a member of the firm of H. P. Converse & Co. I knew that he was a contracting engineer.

Q. So it isn't quite fair to intimate that he didn't know anything about that sort of thing.

A. I am quite sure he did not know. He probably would have understood if I had explained it. There was no reason why I should not explain it.

Q. You knew he was the man at the head of the work and the one who had charge and control of it, did you not?

A. He was not running the job; Mr. Guerini was the man we understood to be running it; after the signing of the contract until he was put off the job; we understood that he was the practical man.

Q. Didn't you understand that Mr. Guerini was subject to Mr. Converse's orders?

A. In respect to the practical points on the job, I never did; I never thought that he was subject to Mr. Converse with regard
314 to the practical end of the work.

Q. You understood that he took orders from him when he was removed from the job, did you not?

A. I understood that, yes. In fact it was I who asked Mr. Converse to remove him from the job. I knew at that time, that he was subject to Mr. Converse's orders.

Q. And you knew that Mr. Converse was an experienced contractor.

A. No, I knew that he claimed not to be on this particular class of work.

Q. But the fact remains that in this interview with him before he sailed to Porto Rico you didn't state to Mr. Converse that you wanted him to go to Porto Rico, because of this misapprehension.

A. We didn't know about this misapprehension until February 28th.

Q. Then you don't mean to say that the reason you asked the representatives of the Guerini Stone Company to come down here, in this telegram, was because of this misapprehension.

A. I didn't say that. The misapprehension was not cleared up until after Mr. Guerini came down here.

Q. That misapprehension had nothing to do with sending that telegram?

A. The apprehension had something to do with it, not the misapprehension. I got the idea that you were trying to give the jury the impression that the reason you called on the Guerini Stone Co., to come to Porto Rico at the time you did, was because you had an apprehension or a misapprehension with regard to the way the walls were to be built. That was the reason why; you understood me correctly.

Q. Then I ask you whether or not you explained to Mr. Converse at that time that the reason was because of this apprehension or misapprehension.

A. We didn't know it was a misapprehension at this time.

Q. Call it apprehension then.

A. Yes, I am sure we talked over the conditions and why he was coming down. As I remember, he was not familiar with the plans and specifications at that time. Mr. Guerini was the one directly in charge of that.

315 Q. Don't you know that Mr. Converse had already estimated the work at that time? Didn't you hear him testify to that effect?

A. Mr. Guerini made the estimate to us. I presume he checked it up.

Q. You heard Mr. Converse testify that before he undertook to finance this contract he made estimates as to the cost of the work.

A. I should think he would very naturally do that, if he was going to spend money on it.

Q. And didn't you as an experienced engineer anticipate when he presented himself, that he had done that?

A. Certainly, he must have.

Q. Then how do you assume that he knew nothing about the plans and specifications?

A. I mean with respect to the detail of it. That particular point confused both Mr. Guerini and myself, who had gone very thoroughly into it: Mr. Converse had not gone into it in detail.

Q. Now, you take the position that you said nothing to him about the way these exterior walls were to be constructed?

A. I think very likely we did talk about it, but that was not the time at which I talked with Mr. Guerini particularly about it.

Q. At the time of this conversation with Mr. Converse, just before he started to Porto Rico, did you explain to him that you intended to go ahead at once with the foundation work?

A. I did not.

Q. Isn't it a fact that about that time you had suggested to the Government that the type of foundations be changed?

A. We didn't suggest it. Captain Stierle suggested it to us.

Q. Now, Mr. Carlin, I show you a letter to the P. J. Carlin Construction Company, dated February 2, 1911, from James Knox Taylor, Supervising Architect and ask you if you received that letter.

A. Yes we received that letter.

Q. Have you any objection to my reading that letter to the jury?

A. Yes, I would like to explain that letter.

Q. Now then, refreshing your recollection from this letter Mr. Carlin, isn't it a fact that under date of January 21, 1911, you suggested to the office of the Supervising Architect in Wash-
316 ington that the pile underpinning of the foundations be omitted and spread footings substitued, and didn't the Supervising Architect refuse your suggestion?

A. I repeat my former answer.

Q. No, I will give you plenty of time; isn't that a fact?

A. That is a fact, yes. It was Captain Stierle who suggested it first to me.

Q. But he was not the man in charge of the building at the time?

A. He was the first government inspector on the work. He had not been appointed, I think until February.

Q. Now, you testified something about shop drawings, Mr. Carlin. Was the Guerini Company obligated by any term in the contract to furnish shop drawings?

A. They were certainly by the custom of the trade.

Q. But not by the terms of the contract.

A. I don't suppose it is mentioned in the contract.

Q. Is it the custom of the trade for that class of work to be done by the sub-contractor?

A. It most certainly is.

Q. How would you make a shop drawing for a concrete wall?

A. You would make the sections for the jointing exactly the way Mr. Guerini did.

Q. You are speaking now of the jointing.

A. Certainly, that was the most important point.

Q. You are talking now about the artificial stone that was to be cast in moulds and put into the wall in that way, aren't you?

A. I am talking about the artificial stone that was cast in blocks. The part about which the Supervising Architect wrote was not cast in moulds, but there was still another part to be cast and for that part shop drawings were necessary.

Q. Those are the ornamental parts?

A. Oh, no, all this part around here.

Q. Weren't these made from full sized drawings furnished by the Government?

A. They were made originally from the general drawings furnished by the Government.

Q. In other words, the Government furnished full-sized drawings for these pieces of ornamental work that you said shop drawings had to be made for.

317 A. No, they furnished it for the eagle, but not for other pieces, and those were the shop drawings that Guerini was to make.

Q. Anyway, you testified at the last trial that that question was all fixed up in July.

A. I don't recollect the last trial. It was not all settled in July.

Q. I find this in your testimony:

"Q. That was before Guerini had come to Porto Rico at all then?

"A. I think it was.

"Q. Were the drawings approved then?

"A. His drawings?

"Q. Yes.

"A. They were not.

"Q. Were any drawings missing then, or was it matter of fault in detail?

"A. There were drawings missing then, and because they did not meet with the approval of the Supervising Architect. They represented to the Supervising Architect how this work was to be done by them but it was not acceptable to the Government.

"Q. Were amended drawings presented later?

"A. They were presented later.

"Q. How much later?

"A. Well, from then on until they were approved.

"Q. And when were they approved?

"A. I judge they were approved some time around July perhaps, but I am not certain as to the date. You understand that plans are sent through the general contractor to the Government. They make such use of them as they see fit; they either adopt them entirely or they make their full sized drawings from them and return them for revision to the sub-contractor, and it is those revised plans to which reference is made in the correspondence.

"Q. They you think it was all fixed up by July?

"A. The final drawings?

"A. Yes.

"A. I think possibly it was."

A. I say now positively that they were not because the correspondence shows it very plainly.

Q. Now this question of whether artificial granite should or should not be used, that was all settled up in January, 1911, wasn't it?

A. It was settled, I should say, about the first of February of 1911.

Q. So that certainly could not have delayed the Guerini Stone Company?

A. It had a direct effect on the natural granite. We could not place an order until it was decided.

Q. And that was decided in January, 1911, before the Guerini people came.

318 A. It was decided about two months after the contract was let, but then we could not let the natural granite contract until that question was settled.

Q. I agree with you, but that question was settled in January, 1911, or the first of February.

A. I should say so.

Q. And the granite did not all get on the site until a year later, did it?

A. About that.

Q. Now I want to just ask you one thing about this. This Exhibit which you put in about Guerini's estimate; I think you said that was given to you about January, 1911, that is, a copy.

Mr. Wait: No, he didn't say that was given him; he said something very similar.

A. The time that Guerini first gave it to me.

Q. So that was the time when you and he had the idea that you might have to build the outside walls out of artificial stone cast and put into the wall, so that all his estimate of the cost of building the exterior walls had nothing to do with the actual cost of them as they were built. I mean the basis in one case has no relation to the other.

A. Yes, it has. He thought it was cheaper to do it in cast stone, and that is why he was urging the cast stone.

Q. The point I am making is that this covers a different kind of work, a different thing than was finally adopted.

A. A different way of doing the same thing.

Q. A different way of doing a somewhat different thing; isn't that right?

A. A different way of doing the same thing.

Q. I know I am not your equal on contract work, but don't tell me that a smooth wall poured in place looks the same as one built of stone cast in moulds on the ground and set in place?

A. It would be if it were all jointed.

Q. Now you also in your direct testimony told us something about a question of settling the jointing which I take to mean the question of settling the possibility of there being a visible line where one day's work was poured on top of another day's work.

A. That is correct.

Q. Now in your testimony on the last trial you admitted finally, didn't you, that that question caused no ultimate delay to the

319 Guerini Stone Company in their work?

A. I don't recollect what I testified the last time, but I can tell you what the actual facts are.

Q. It is a fact that it never caused them any delay?

A. They never did the work.

Q. Exactly; they never got a chance did they?

A. They never could have done the work until the jointing ques-

tion was settled, and it was never settled, not up to the time that they quit, so far as I know.

Q. As a matter of fact, it didn't have to be settled until they got a chance to start the work, did it?

A. It had to be understood before they started, how they were going to do it.

Q. But until they got a chance to start you didn't have to have it settled, did you?

A. No.

Q. Then before passing to another point, Mr. Carlin, I understand you now to admit that the question of the discussion over the jointing really caused no delay in the work of the Guerini Stone Company under this contract.

A. I had already said that there was no concrete work done, and therefore no jointing done.

Q. And therefore no delay?

A. No ultimate delay.

Q. Did you testify to that? Do you remember that?

A. Yes, but I think that it is capable of being interpreted. They didn't do the work and therefore it didn't delay them. If they had done the work, it certainly would have delayed them.

Q. Didn't you answer a question referring to the jointing: That I understand was taken up at the time with Mr. Stierle. Later on Mr. Berryman came here, and certain things that had been decided by Mr. Stierle, were set aside, and I think the question of the jointing was settled, I mean later than July, and by the Government agreeing that it would be necessary to make some line of demarcation on the successive day's work, and submitting a plan showing the height, I think, approximately, about three feet.

A. Yes, it was settled by Mr. Berryman, but he came here along about Jany. 25th. It was settled some time later than the first appearance of Mr. Berryman on the job, which was January
320 25th.

Q. Now the question of these samples of the finish; it is true, is it not, that a set of samples was sent to you in New York by the Guerini Stone Company by mail or express?

A. Yes.

Q. About when did you get them?

A. The first samples that we got were of artificial granite.

Q. And then later didn't you get a set of samples of the concrete finish?

A. Yes, they didn't come from Porto Rico, the first samples. The second samples came from Porto Rico. I think some time in May or June. Those are the ones that were broken.

Q. And nearly two months later didn't you get a letter from the Guerini Stone Company asking what action was taken on those samples?

A. I think it was received from the Boston office and from the San Juan office, they had already sent samples to Washington.

Q. That was two months later?

A. Yes, I think so, about that. We notified our office immediately

that they were broken and they communicated it to the Guerini Stone Company at San Juan.

Q. Now you put in a couple of letters, one dated December 12, 1911, and another dated December 14, and I show you a letter to the P. J. Carlin Construction Company, New York, dated December 13, 1911, signed Guerini Stone Company, and ask you if that is not a reply to the first of the two letters that you put in.

A. I remember that letter.

Q. And here is a letter of December 18th to you from the plaintiff in reply to your letter of the 14th, did you get that?

A. Yes, I remember that letter.

Mr. Paine: I offer this in evidence.

Mr. Wait: I make merely the objection that there are self-serving declarations in it, but otherwise I don't object to it.

Mr. Paine: It is understood that this will be under the same ruling that your Honor has made. I am also anxious to show that there was no waiver of these points, and of course for that it is material.

The letter was then placed in evidence, marked: Exhibit
321 30, for the plaintiff, and read to the jury by counsel.

The Court: It is admitted, gentlemen, the same as the other letters.

Mr. Paine: And here is another letter that will come under the same category.

Mr. Wait: The same objection.

The Court: The same ruling.

The letter was then placed in evidence, marked: Exhibit 31 for the plaintiff, and read to the jury by counsel.

Mr. Wait: The Court will of course instruct the jury that they are to consider this in the same way.

The Court: The same ruling, gentlemen, that I have made several times. The letters prove what is contemporaneous with the letter, but not whatever it recites as having occurred before and not what it may say as to what will happen in the future, as has happened several times in some letters. You are entitled to have the whole letter so as to get the admissibility of the whole matter, but you are to take it with that understanding. It would not be right for the Court to cut out part of it.

Q. You said you received a certain amount of money from the Government for underpinning the foundations.

A. Yes.

Q. It is a fact that when the Government agreed with you to have you do the work, it was also agreed that the question of responsibility for that situation was reserved and not decided, wasn't it? Isn't it a fact that reservation was made in the agreement?

A. I don't believe it was. At least I know it was partially decided when I went over it with the Assistant Secretary.

Q. Didn't you have a letter from the Government conveying the instructions and the conditions?

A. Negotiations leading up to it.

Q. Did you ever see that (handing a paper to the witness)? That calls for an answer yes or no.

A. Yes, I saw that. I want to explain it. I am pretty sure that in the preliminary negotiations the question was not settled
322 and we were ordered to Washington to have it settled, and it was pending until it was finally settled by agreemnt, whenever it was, before we started on the work.

Q. The question of responsibility was settled before you started on the work, oh, yes, but it was not settled at the time that the Guerini Stone Company served notice on you May 22d, 1912.

A. Yes, sir; it was settled prior to that. The Supreme Court said that it was not settled, but it was. They paid us the money.

An adjournment of Court was taken at this time until June 7, 1916, at 9:30 a. m.

June 7, 1916.

Cross-examination of Mr. CARLIN continued by Mr. Paine:

Q. Mr. Carlin, you remember about those samples of the exterior finish that you said were sent to you in New York in May and came broken.

A. I do.

Q. Now isn't it a fact that it was not until August 5th, after you had received a letter from the plaintiff about these samples, that you informed them that they were broken?

A. We notified our office here immediately that they had been broken and they notified the San Juan office of Guerini. They told me so.

Q. I show you a letter of August 5th and ask you if you sent that letter to the plaintiff.

A. Yes, I sent it.

Mr. Paine: I offer that in evidence.

Mr. Wait: No objection.

The Court: No objection, the letter is admitted.

The letter in question was then placed in evidence, marked: Exhibit 32 for the plaintiff, and read to the jury by counsel.

Q. Between February and some time in May was the time
323 when you were having your negotiations with the Government with regard to the kind of foundations you would put in.

A. Yes.

Q. So it was not until some time in May, 1911, that you actually started work on the foundations, was it?

A. Not at all; there was no change in the first half of the foundations. It was only in the latter half, and it was about that time that the change was made, and there was no delay at all in those foundations. 900 piles were omitted.

Q. Didn't you admit in your testimony on the first trial that there was some delay?

A. I remember distinctly that the negotiations extended over the period that you just gave. That period would have been occupied in the doing of the work and it was not done.

Q. It would have been occupied, except that the negotiations were going on.

A. The negotiations were going on at that time.

Q. Now the foundations were completed so that the work was ready to proceed some time in July, weren't they?

A. They were practically completed, I should say, about July, 1911.

Q. Now with regard to this unit of thirty-five cents a cubic foot that you said you used in making up your basis of payment for that first payment to the plaintiff, where did you say you got that unit from?

A. I got that from our contract with the Government. There was no such unit in the Guerini Stone Company's contract with us, expressed in feet. There was a unit in yards; $6.70 a yard. I didn't say that we used this unit of thirty-five cents for the interior walls and the roof. It was for the work in the basement. That was for the work that the Guerini Stone Company had done up to the time they quit. They never did any other work above the first floor, which was to be imitation stone work. The only place where the unit of $6.70 a cubic yard appears in the contract is in clause 25, which reads: "The sub-contractor further agrees to furnish the material and build the concrete footings complete to the basement floor for the sum of $6.70 a cubic foot." But it was understood $6.70
324 a cubic yard. Clause 25 applies to the material and concrete footings to the basement floor, that means below the basement floor.

Q. Did the Guerini Stone Company have any obligation to put in any concrete below the basement floor?

A. The concrete above the basement floor is the same.

Q. Did they have any obligation to put in any concrete below the basement floor?

A. The contract says that they did not, but the work was identical in every respect.

Q. So it is true, is it not, that this $6.70 in the contract did not apply by the terms of the contract to any work which the Guerini Stone Company had to do?

A. Below the basement floor. That was by m yinference.

Q. You don't mean to tell us that a fair cost of putting in the concrete in the foundations would be a fair cost of putting in the concrete that the Guerini Stone Company had to do.

A. I can say that the concrete that we put in below the basement floor was exactly the same as that they put in above the basement floor. Exactly the same with regard to the forms and everything else that had to do with it, and the granite backing was cheaper than it was down below because they had only one form.

Q. I am not an expert on this, but isn't it a fact that your concrete foundations were what they call spread footings?

A. It was.

Q. Now am I not right in saying that a spread footing foundation is like an inverted T, that is, there is a sort of snowshoe or broadened space or mass of concrete on the bottom and the wall built on top?

A. Yes, like your foot is the spread footing for your frame. And to make those spread footings we dig a trench in the ground the width of the spread footings. We couldn't leave the earth here in exactly the size shown on the plans because it is partly sand and it is not solid and will not stand up and therefore we have got to dig the earth in the hole as near the size as we can and then waste concrete or put in forms, and in this case we put in forms for the footings on the bottom. In either case the cost would be about the same.

325 Q. Isn't it a fact that you made some of these spread footings without forms?

A. I do not think so. If we did so, we certainly put in extra concrete that offset the cost of the forms.

Q. How thick were these footings?

A. The footings in this wall were 9' 6" and in this wall over here 4' 6".

Q. How thick were the interior walls in the basement that Mr. Guerini put in?

A. Immediately above the footings was placed a bearing wall and that bearing wall was the wall that had to go up to the basement floor level and there was a wall continued immediately above that of exactly the same thickness as the wall below, which we put in. That was the wall which theGuerini Stone Company had to put in; the same thickness, the same material, the same everything except that it was a little bit higher above the floor than the work that we put in.

Q. You don't mean to say, do you, that the walls that the Guerini Stone Company put in were as thick as those concrete footings in the foundations?

A. No, that is just what I am going to develop. I can develop my point.

Q. I am going to develop my point, and the point I want to bring out is this, that the walls that the Guerini Stone Company made were not as thick as the footings at the bottom of the foundations; that is a fact?

A. Yes, sir.

Q. The largest part of the expense in laying concrete is in the form?

A. Part of it.

Q. That is a large expense, isn't it?

A. Not anywheres near as large a part as Mr. Converse testified to.

Q. Now it is a fact, isn't it, that a very large part of the expense of pouring concrete is the expense of putting up the board forms and bracing, labor in doing that, etc., isn't that a large part of the expense.

A. It is a part of the expense.

Q. Isn't it a substantial part?

A. It was a substantial part on the imitation stone work, but it was not a substantial part in the basement floor work.

Q. The cost of putting up these wooden forms is not a substantial part of the cost of pouring your concrete?

326 A. It is in some places, Mr. Paine, and in other places it is not a substantial part. It is certainly a part.

Q. Whether or not it is substantial depends on how thick the walls are?

A. That is a controlling factor in the cost.

Q. So where we were building thin walls so we had to put up two board forms, one on each side for a thin wall, the cost of the board forms per cubic yard of concrete would be largely in excess of where you were putting in a mass of concrete some eight or nine feet thick; isn't that a fact?

A. It certainly is a fact.

Q. Do you still insist that the figure per cubic yard that you had in your contract with the Government for putting in the foundations below the ground was a fair figure for the cost of our work in building these interior walls and backing the granite above the ground?

A. The concrete to which that unit was applied.

Q. Can't you give me an answer to that, yes, or no?

A. It is a fair price for the work that they did.

Q. They put up a substantial amount of these interior walls, didn't they?

A. They did not. They did the work around the exterior walls, the big, thick, heavy walls. The derricks which they insisted on having put in the center of the building prevented them from putting in the walls that you speak of.

Q. As a matter of fact, isn't it a fact that the cost to you of putting in the concrete foundations exceeded thirty-five cents a cubic foot?

A. It is certainly not a fact, Mr. Paine, nor did it equal that.

Q. Now, Mr. Carlin, I remember your making a remark in your direct examination to the effect that two bodies could not occupy the same space at the same time, with reference to the derricks.

A. By that I meant that you could not use the two derricks at the same point on a building at the same time. If there had been motive power to run both derricks, they could both have been used on different parts of the building at the same time and they could have been used in setting granite and putting in concrete to back the granite at another end.

327 Q. You said that Mr. Follett insisted on a ten per cent, you called it on the payrolls, at the time you asked him if he wanted to let you use his men. Did he tell what 10% was for?

A. Not that I recollect. He said that it would be ten per cent.

Q. Didn't he tell you that he would give you their men if you would pay him certain amounts on their pay for ice, etc.?

A. No, he refused to give us any information on that at all. I don't remember any letter.

Q. Now, Mr. Carlin, I want you to bring your mind down to that

interview with Mr. Converse on February 1st or 2d, 1912; that was the date, wasn't it?

A. I think it was.

Q. Let us get that fixed.

Mr. Wait: Mr. Converse said it was either February 1st *and* 2d.

Q. Was it either February 1st or 2d?

A. Yes, it was, Mr. Paine.

Q. Now that was after Mr. Converse had made various requests on you for payments some of which are in evidence; isn't that a fact?

Mr. Wait: I object to that, because unless it be shown that the request was made in obedience to the contract.

Mr. Paine: That is not the purpose. I am not cross-examining him as to the credibility of his versions at that time and I am entitled to bring out all the attendant circumstances.

The Court: The objection is overruled.

Mr. Wait: Note an exception.

A. It was after Mr. Converse had made requests for payment in various forms from both Boston and San Juan, covering a period of about a month.

Q. By the way, in addition to your qualifications as an expert witness, you have studied law, haven't you?

A. Yes, I have studied law.

Q. And this interview was after these applications had been made and no payment had been made by you pursuant to those applications, wasn't it?

A. No payment had been made up to this time.

328 Q. And there was no figure stated in the contract for a unit on which applications for payment were to be based, was there?

Mr. Wait: I object to that. You have already asked it a few minutes ago and it calls for a construction of the contract.

Mr. Paine: I will get at it in another way.

Mr. Wait: I will admit it for the record. It has already been asked once this morning.

Q. Mr. Converse had come down to New York from Boston to see you, hadn't he?

A. Yes, sir.

Q. And didn't he tell you that the purpose of his coming down to see you was to get some unit agreed on?

A. The purpose that he came down for was to get some money.

Q. But didn't he also tell you that he wanted to get a unit fixed so that he could make an application in form so that he would get some money?

A. When he came, it was to get the quantities, to agree upon the quantities.

Q. Did he speak about the unit?

A. He spoke about this $1.07.

Q. So he told you that he wanted a unit so that he could base his applications for payment on it?

A. We both wanted quantities and units; we couldn't agree on them however.

Q. And it was at that interview that you handed him this paper which is in evidence which has certain unit prices on it?

A. I never handed him that paper.

Q. Wasn't that the paper that you had written out and gave to him?

A. Mr. Lovering gave him that paper when he asked for it.

Q. Under your instructions?

A. He requested it and I gave it to him; yes, sir; through Mr. Lovering.

Q. Now the unit given on that paper, the unit of $1.07, was the unit on which you were actually being paid by the Government for the work which had been done by the Guerini Stone Company, wasn't it?

A. No, on the contrary, it was prior to that date that the $1.07 was changed, January 31st.

Q. Up to that time you had been paid on that basis, hadn't you?

A. I just told you that on January 31st, the unit was changed.

329 Q. Up to January 31st you had been paid on that basis, hadn't you?

A. No.

Q. Well up to December 31st you had been paid on that basis.

A. We had; yes, sir.

Q. For work actually done by the Guerini Stone Company.

A. For work done by the Carlin Construction Co., on this building, some of which had been done by the Guerini Stone Company.

Q. And that was the unit that you had agreed with the government engineer.

A. That was the unit that the government engineer placed on it, Captain Stierle, $1.07.

Q. Did I understand you to say that you told Mr. Converse at that time that the unit had been changed?

A. Of course, I told him of the difficulty that had come up.

Q. Did you know that of your own knowledge or did you get it by letter from down here?

A. I knew it by letter from down here.

Q. That is one of these letters that were sent up in the ordinary course of business by Mr. Oaksmith?

A. I knew it from the payments that we received as well.

Q. Now you are absolutely certain of that? In your testimony on the first trial did you make any mention at all of the fact that the unit had been changed at that interview of February 2d or that you told Mr. Converse about it?

A. I don't recollect.

Q. Do you want to look at your testimony and answer?

A. I don't know where to find it, Mr. Paine.

Q. I have the page here. First let me ask you one or two ques-

tions in connection with that. You testified on behalf of the defendant on the first trial, didn't you?

A. I did.

Q. You were examined at length by your counsel, were you not?

A. I was.

Q. Did you then testify that you told Mr. Converse anything about it at the time of the conversation you have testified about.

Mr. Wait: I object to that. He may not have been asked.

The Court: The witness does not have to look through his
330 testimony unless he wants to. He can answer yes or no or that he does not recollect.

A. That is all I can say, that I answered all the questions that were put to me by either counsel, as well as I could.

Q. And you still maintain that at that time, at that conversation you told Mr. Converse that Mr. Berryman had changed those units?

A. Yes, sir; or that it had been changed.

Q. You have forgotten, Mr. Carlin, have you not, that Mr. Berryman did not get to Porto Rico until January 25th?

A. I have not forgotten it at all. I recollect it very distinctly.

Q. He came down, I think you said, to investigate the foundations.

A. No, he came down here to take charge of the work. That was included in his duties.

Q. And do you still maintain that you had received a letter from Porto Rico informing you that Mr. Berryman who had arrived on the 25th, had changed the units of payments, and that you had received that letter by February 1st or 2d in New York?

A. It may not have been a letter. We received information from our San Juan office I know, because I was not here.

Q. And you said you received it by letter, didn't you?

A. We received it by letter.

Q. You didn't get a cable did you?

A. I might have.

Q. Did you get a cable?

A. I don't recollect.

Q. Have you a cable that you can show me that you received on that subject?

A. I don't recollect any, but I will say, Mr. Paine, that Captain Stierle had gone over this and that this difficulty had been pointed out.

Q. You told the jury that you knew that Mr. Berryman had changed the units, at the time of this conversation. I am going to give you all the chance on this because it is important and I am going to give you an opportunity to read the testimony of Mr. Berryman on this point if you want to. Now I want to warn you, Mr. Carlin, that I am going to read this in evidence and that is why I am giving you an opportunity to read it now.

331 Mr. Wait: Why don't you read it in evidence? Why do you do this way?

Mr. Paine: I will if you wish but I wanted to give him a chance to change his testimony if he desired. Page 267 in the testimony of Mr. Berryman.

Mr. Wait: I don't object to your reading it.

Mr. Paine:

"Q. Now, Mr. Berryman, will you tell us if you can, when it was that you first notified the Carlin Construction Company that you thought that the basis of payment was too high?

A. I don't know that I notified them by letter.

"Q. Well whenever it was.

"A. It was, I suppose, when the voucher was paid. I landed here on the 25th of January and the payment was due on the 31st, and I remember that they gave me an estimate which they said they were in the habit of giving Mr. Stierle. It was thirty some thousand dollars I think, if I remember correctly, and my impression is that part of that figure was for granite and part was for concrete. They undoubtedly were figuring the concrete unit at $1.07, and I paid them $20,000.00, and according to that payment, I should think that they would have known that I was disallowing the concrete figure. I must have told them at that time if I told them."

Q. In view of that testimony, do you still insist that you knew at the time of that conversation on February 1st or 2d that $1.07 was not the unit that was being used by the Government Superintendent at San Juan?

Mr. Wait: That word "paid" should be "made." I think you are taking advantage of the witness.

A. I do.

Q. I again say, do you still insist?

A. I do insist.

Q. Well after that conversation, Mr. Carlin, you got a letter dated February 6th from the Guerini Stone Company, didn't you, which is in evidence and in which they said: "In accordance with your instructions to Mr. Converse, we have made our January requisition in the units and unit prices used by the government
332 engineer when he makes up monthly estimates according to your schedule of amounts." You got that letter, didn't you?

Mr. Wait: I object to this. This is mere summing up.

Mr. Paine: That letter is in evidence.

The Court: That is a letter to whom?

Mr. Paine: From the plaintiff to the defendant.

The Court: Overruled.

Mr. Wait: Note an exception.

A. Yes, I received that letter.

Q. Did you ever write any letter in which you denied the statement in this letter?

A. I denied it at the conference about which we have spoken.

Q. Did you ever write any letter denying that?

A. I probably did not myself because I came down on these foundations right away.

Q. Can you show me a letter written by any of your company denying it?

A. I made a payment which would have denied it. The terms of the payment indicate its denial; the one in March.

Q. But didn't you get a letter from the plaintiff dated March 9th, 1912, which says as follows: "When our Mr. Converse was at your office February 2d you gave us a memorandum of prices for work done on this job, stating that they would be the basis on which we would be paid and to make our application to you on that basis." You got that letter didn't you?

A. I got that letter.

Q. And did you ever write any letter in reply?

A. I think we made a payment just about that time which did deny it.

Q. That was the payment of six hundred and seventy odd dollars, wasn't it?

A. Yes, sir.

Q. Now, man to man, Mr. Carlin, isn't it a fact that you told Mr. Converse that if he would make his application on that basis, you would pay it?

A. I most certainly did not, Mr. Paine, tell him anything of the kind. I could not have told him that.

Mr. Paine: That is all.

333 Redirect examination.

By Mr. Wait:

Q. About this Berryman testimony, where did you get your voucher payments from?

A. From Washington.

Q. Where was Mr. Berryman?

A. He was in San Juan.

Q. Could it be possible that he told you anything about this payment at the time your voucher was paid?

A. No.

Q. He was not there when you were paid the voucher was he?

A. No, the vouchers are sent to Washington and the payments were made from there to New York.

Q. Then the Treasurer *or* the United States Government, or whoever it is, writes a check and sends it to your office.

A. No, he sends first a voucher to us to be signed and that is sent back to Washington and then the check is sent. In other words, they exact a receipt before they give us a check.

Q. When Mr. Berryman made this voucher he was here in San Juan?

A. Yes, sir.

Q. And so I suppose when the voucher was paid it could not be

possible, but it could be possible when the voucher was made, couldn't it?

A. It certainly could.

Q. And the time that the voucher was made was at the time that he made it here in San Juan when he came here between January 25th and January 31st, is that right?

A. That is correct. It was one of the things that Mr. Guerini brought up with Washington, that we had been overpaid, and the very first thing that Mr. Berryman did when he got down here was to go into the matter of payment.

Q. Now, Mr. Carlin, I think you said that there were omitted 900 piles under this building.

A. That was done by the Government's direction.

Q. Now you were asked this question: "Would this time have been occupied in doing work if there had been no negotiations?" And you answered, "yes." That time would have been occupied in doing what work?

A. Occupied in doing the work that was omitted. The driving of the piles. That is what I meant when I said that the time that the negotiations were going on, would have been occupied in doing the work which was omitted, driving piles, and that is what I meant by saying that there was no delay.

334 Q. Now these footings, Mr. Carlin, were nine feet thick or wide for what height up?

A. The footings, for about 1½ to 2 feet. They came right in and the wall was placed on them. They came in horizontally. The footings were seven or eight or nine feet wide only for a foot and a half up from the bottom, and then they came right into the wall, we had to use forms on them.

Q. Now these wooden forms on the walls from the basement floor up and on plain surfaces that are vertical and without any decorations or panelling or anything of that kind, are they plain wooden forms that are used over and over again?

A. They are. That is the practical form for that work that is hidden.

Q. Mr. Carlin, on plain walls of that kind that are to be finished, do they use much bracing or do they use wires that go right through the wall?

A. They use wires, and afterwards clip the wires off and leave them in. In that case very little bracing is needed.

Q. Now, Mr. Carlin, this granite work which the plaintiff did, did they finish it?

A. They did not. They finished no part of the work. They omitted the cleaning and pointing. That is a very material part of the granite work.

Q. Now did they finish the concrete work?

A. They did not.

Q. What did they omit of the concrete?

A. They omitted the surfacing. After the forms are removed, as this concrete was exposed in the basement, it had to be surfaced and smoothed.

Q. Now do you know what you pa in New York on account of materials that you purchased, that is, do you know the amount that you paid?

A. I paid it and disbursed it myself for cement. The bills were sent to New York and I paid it in New York, for cement bought down here, $2,969.88.

Q. Now last evening when you got to thinking over this job did you discover anything about the time of Guerini's completing the work?

A. I did. It was practically completed about the latter part of 1913. He quit entirely about June, 1914. He did very little work after that.

335 Recross-examination.

By Mr. Paine:

Q. A voucher to be paid on January 31st would probably be made on January 31st and not earlier, wouldn't it, Mr. Carlin?

A. The voucher would be made and gone over from the 25th to the 30th.

Mr. Paine: That is all.

Witness withdraws.

Mr. Wait: Mr. Oaksmith has gone over what he paid up to the time he quit and I want to present him for that.

The Court: Is there any objection?

Mr. Paine: At the opening of the trial I agreed with Mr. Dexter that the witness withdraw and I am informed that Mr. Oaksmith has been in Court during the trial of this case. In fact I have seen him myself and I think it is only fair for me to object to Mr. Oaksmith's testimony under the rule.

Mr. Wait: Now I submit, if the Court please, Mr. Oaksmith was not in this room over five minutes. Mr. Paine knew he was here and didn't call my attention to it. And this morning he sat there working about three minutes while Mr. Carlin was testifying and he was pushed out quick. And I don't think that should affect this case.

Mr. Paine: Before Mr. Oaksmith took the stand and gave his general testimony, I knew he had been in the Court room and I didn't object because I knew he was a material witness and I didn't raise the objection, but now that he is going to be called back to rehash something, I object, because he has had his try at it.

Mr. Wait: He is not going to rehash anything.

The Court: The objection is sustained. It is within the rule.

Mr. Wait: The objection on the part of Mr. Paine that the testimony of Mr. Oaksmith is excluded entirely from the record?

336 The Court: No, he is not allowed to go back on the stand.

Mr. Wait: May I employ another witness to read that from the books?

The Court: Yes, you may call the next witness, whoever it may be.

Mr. Dexter: Will you permit me to get this on the record?

The Court: Yes, sir.

Mr. Dexter: The witness Oaksmith states that he was not in the courtroom during the progress of the taking of any testimony prior to this morning and that this morning he was here but a few moments and paid no attention to the witness. That it was through a misunderstanding on his part and he heard nothing of the testimony.

The Court: I don't know about that practice of counsel getting up and making a statement of that sort.

Mr. Dexter: It is not a question of practice. It would seem to be a question of justice and fair play.

The Court: The rule is that if a witness is desired, he must not remain in the courtroom. The Court saw Mr. Oaksmith in the courtroom. Objection is made to his going on the stand because he was in the courtroom and the objection is sustained under the rule. That is all there is to it.

Mr. Dexter: Note an exception, your Honor.

Mr. Wait: Will your Honor permit me to recall Mr. Carlin?

The Court: Yes.

JOSEPH P. CARLIN, being re-called as a witness in behalf of the defendant, testified as follows:

Direct examination.

By Mr. Wait:

337 Q. Mr. Carlin, have you taken the books of the P. J. Carlin Construction Company which Mr. Oaksmith testified with respect to yesterday and have you with Mr. Oaksmith taken off the quantities and the amounts of material expended on this work?

A. We have.

Q. And between what periods, that is, did you take it up to the time that Mr. Oaksmith left?

A. We did.

Q. And do you know when that was?

A. It was November 22, 1913.

Q. And do the books show that?

A. They do.

Mr. Paine: The Reporter calls my attention to the fact that the books were not offered in evidence.

Mr. Wait: I will offer the books in evidence for the period between December 1, 1912 and November 23, 1913, including the journal, the ledger and the cash book.

The Court: The books are admitted, if they have not been admitted, for the time that Mr. Oaksmith testified that he personally kept them. I am not aware of any other testimony.

Mr. Wait: Now I prove by this witness when he did leave.

The three books were then placed in evidence and marked: Exhibits "NN," "OO" and "PP" for the defendant.

Q. Now, Mr. Carlin, between what dates or periods there have you taken the payrolls?

A. The payrolls between the periods of March 5, 1913, and November 22, 1913, the aggregate is $33,839.58. There is no credit. We took likewise the material account from February 28, 1913, to November 22, 1913, and the amount is $20,540.05.

Q. What payrolls, according to your cash book, were paid to Guerini or his men and during what period?

A. The payrolls to the sub-contractor Guerini amounted to $14,004.87 from Nov. 20, 1912, until Nov. 22, 1913. Now during that period we paid for sundry materials to Guerini.

Q. What do the books show that that money was disbursed for?

A. For board, for sundries, for shellac and other small
338 things to the amount of $1,786.34. I have likewise taken from these books the aggregate of certain materials bought which Guerini used in building and which I paid for for him. Between the period of Nov. 20, 1912 and Sept., 1913. I do know what that material largely consisted of. It was cement, Atlas Cement, sand forms, water, power, and stone. The aggregate of them was $12,779.97. The aggregate of those figures that I have given is $82,950.83.

Q. Now does that cover the entire period that Mr. Guerini was doing this work?

A. No.

Q. Now I think that you credited before on the $92,000.00 some $4,500.00 for steel setting and for brick work?

A. Mr. Oaksmith did, yes.

Q. Deducting that $4,500.00, what does it leave?

A. It leaves $78,450.83.

Q. In this work, Mr. Carlin, did you work last evening with Mr. Oaksmith and take this from the books yourself in your handwriting?

A. I did. I know that those are correctly transcribed from the books. I am giving them merely as a clerk who abstracted them from the books.

Q. Is it taken for the period in which Mr. Oaksmith was here on the work and in charge of it?

A. For that period only. I have taken no figures that go past November 22, 1913.

Q. Do I understand that this $78,000.00 is for disbursements on account of work under the Guerini Stone Company's contract up to November 22, 1913 and after May 22, 1912?

A. It was for part of the disbursements up to that time; I haven't taken them all out. This is on account of the contract that we had with Mr. Guerini, and is for doing the imitation stone work and the work above it.

Mr. Wait: I offer it in evidence.

The Court: Any objection?

Mr. Paine: I object on the ground that the said contract made with Mr. Guerini, which is offered in evidence, contains work to be done by him which was not included in the contract in issue between the

parties. Of the approaches mentioned in the general specifi-
339 cations and shown in the plans. We had nothing to do with anything of that sort.

The Court: That is a separate contract with Guerini, individually?

Mr. Wait: Yes, sir.

The Court: It is not the contract sued on?

Mr. Wait: No, sir.

The Court: The fact seems to have been according to the evidence, that the defendants, after the alleged termination of the contract by the plaintiffs, employed Mr. Guerini individually to do the work which it alleged should have been done by the plaintiff, and this, as I understand, is the contract under which he proceeded.

Mr. Wait: I so understand.

The Court: For that reason the paper is admitted.

The contract in question was then placed in evidence, and marked: Exhibit "QQ" for the defendant.

Mr. Wait: This, gentlemen, is a contract for what we claim is the same work that the Guerini Stone Company was to do. I don't need to read it all to you. It is for $35,150.00 and is dated November 20, 1912.

Q. Mr. Carlin, I show you one document, a copy, dated June 17, 1914, and ask you if you know where the original of this is?

A. I do. It is in New York, and there is also a copy in Mr. Hartzell's office here. He is the attorney for A. Guerini. I know it to be a copy of the original. I dictated it, because it was done down here while I was here. It was signed by Joseph W. Cody. I know that this is a copy of the contract or agreement. And I know that it was executed.

Mr. Wait: I offer it in evidence.

Mr. Paine:

Q. Mr. Carlin, is the original of this contract in your office in New York?

A. One of them I believe is, yes.

Mr. Paine: There are so many grounds of objection to this that I will not try to think of them all. My first ground of objection is that the original being in the possession of the defendant, it
340 is not proper to offer secondary evidence in the form of a copy. The second ground of objection is that it is incompetent, irrelevant and immaterial because it has nothing to do with the issues of this case and is not binding on the plaintiff. It appears to be some sort of a settlement made by Mr. Guerini and the Carlin Construction Company and they got together and settled on the prices paid. Of course any settlement that Mr. Guerini made with the Carlin Construction Company is not binding on us as to the value of the work we had to do or what it would have cost us to do it if we had proceeded with our work. It is an agreement of settlement. I suppose that is what you would call it.

The Court: Let me see the paper.

(The paper in question is handed to the Court.)

Mr. Paine: I add one ground of objection which I think of. That is, that I understand that Mr. Carlin is now on the stand simply as a clerk, as I think it was put by Mr. Wait, and that he was not recalled for the putting in of new evidence, and that therefore this is not proper at this time.

The Court: The objection is sustained. This looks to me like res inter alios acta.

Mr. Wait: The Court will grant me an exception.

The document in question is marked: No. 19 for the defendant for identification.

Mr. Wait: Not knowing what the practice is, I offer it over again and take an exception.

The Court: I refuse it, the second time.

Mr. Wait: That is required in our practice, if the Court please. I take an exception.

Mr. Wait:

Q. Mr. Carlin, was Mr. Guerini paid in full for everything that he did on this work?

A. He was.

Cross-examination.

By Mr. Paine:

Q. These amounts and periods that you have given us as taken from the books are for entirely different periods than those
341 stated by Mr. Oaksmith as the periods during which the work was done under the Guerini Stone Company's contract, aren't they?

A. I don't recollect what his were, but they are different because they do not cover the entire period.

Q. But Mr. Oaksmith testified that the period covered by this work was from March, 1913, to June 27, 1914; that is about right, isn't it?

A. I think it was.

Q. And you have put in expenditures there from as early as November 29, 1912, haven't you?

A. Yes, sir, I have.

Mr. Paine: That is all.

Redirect examination.

By Mr. Wait:

Q. And the contract with Mr. Guerini, Exhibit "QQ" for the defendant, is dated November 20, 1912, and did Mr. Guerini start on or about the time that this contract was signed?

—. ——.

Q. Well you were here in November, 1912?
A. I think I was.
Q. Were you here at the time Mr. Guerini started?
A. I think the first trial of this case was going on about this period.
Q. And Mr. Guerini was starting, was he?
A. We made up a contract on November 20th, so he started about that time. I went north after we made that contract.

Mr. Wait:

Q. Do you know that Mr. Guerin- did start his work at about the date of this contract?
A. I do. And our disbursements started at about that time.

A Juror:

Q. In the performance of the new contract with Mr. Guerini, was that done uninterruptedly, that is, without any interruption, any delay, done satisfactorily, that is, there was no disagreements on account of his peculiar way of *being*, was there?
A. Under the sub-contract with Mr. Guerini, he acted as an employee practically of ours, because we paid all his payrolls and we paid all the material accounts and we allowed him $35.00, I think it was, a week. So all he had to do was to go on the work and make the moulds and all the other work was done by our men. He was practically an employee, a mechanic, for the specified sum of $35,-150.00.

Witness withdrawn.

342 Mr. Wait: I want to read the following extracts from Mr. Berryman's testimony, page 115, four lines from the bottom:

"Q. Are you able to state the quantities of that work and the unit of price, that is to say, how much per cubic foot you calculated that to be?
"A. That was for walls only, and some of the work was for fifty cents a cubic foot and some for thirty-five, depending upon the size of the walls and whether they had reinforcing in them or not.
"Q. Where were these walls, between the basement level and the granite?
"A. You mean all of the walls generally, where were they?
"Q. Yes.
"A. Between the basement floor level and the top of the granite that was set. It included plain walls and the backing of the granite.
"Q. Include any interior walls?
"A. Yes, and interior walls.
"Q. In the making of your vouchers for the payment to the P. J. Carlin Construction Company, what unit did you allow to them, unit for payment of this concrete work; how much per cubic foot?

"Mr. Paine: I want to note my objection to this as incompetent,

irrelevant and immaterial on the ground that the arrangements for payment made between the defendant and the Government Superintendent, being controlled by the terms of the contract, the unit which they had put into their contract between themselves and the Government, have no relevancy to the question of payment or of value on the work done by us. In other words, simply for the purpose of argument, if the Carlin Company made a bad bargain with the Government, they cannot charge us with it.

"The Court: That appears to be correct, Mr. Wait.

"TheCourt: The objecttion is overruled.

"Mr. Paine: Note an exception.

"A. 35 and 50 cents for that work. The exterior walls above would be a greater unit than that.

"Q. Nothing has been done, as I understand, by the Guerini Stone Company above that to call into application the other unit.

"A. No.

343 "Q. In connection with this last statement, it is a fact then that no payment has been made or allowance by you or by the Government for any work above the basement floor.

"—. ——.

"The Court:

"Q. Above the first water table.

"A. Except for steel work.

"Mr. Dexter:

"Q. I mean to say, there has been no estimate or allowance made for imitation sandstone.

"A. No.

"Q. In making or approving the vouchers to the P. J. Carlin Construction Company for this $15,412.00, this was for the concrete work below the artificial stone work, or the imitation sandstone.

"A. Yes, I suppose you mean by the imitation sandstone, cast concrete. The Government calls it cast concrete.

"Q. Is it a fact that the Superintendent who was here before you approved the estimates on a basis of $1.07 per cubic foot?

"A. I don't know what basis he used. I know that the concrete work on the footings and the falls below the basement floor level had been overpaid about $8,000.00. I don't know what his unit was.

"Q. Is that why you approved the vouchers on the basis of 35 and 50 cents per cubic foot?

"A. That was not the reason I used it.

"Q. When you approved them on that basis, is that, in your judgment, the proper basis?

"A. In this case it was more than that. It had been approved or agreed on by the contractors and the former superintendent as a proper basis.

"Q. But you approved this basis of 35 and 50 cents per cubic foot?

"A. Yes, I naturally approved it or I wouldn't have used it.
"Q. Did you consider the application of a unit of $1.07 as a misapplication of the proper unit?
"A. I just said that I did not use that.
"Q. But assuming that the former superintendent used it.
"A. Assuming that he used $1.07, yes. The other question I should think would answer that.
"Q. How do you explain then the overpayment of $8,000.00, by the difference in the units?
"A. I could not explain that.
"Q. Isn't that one way it could be explained?
"A. It could be explained that way; yes, sir."

Mr. Wait: Mr. Berryman was re-called and I offer another extract at page 252, eight lines from the bottom:

344 "Q. What was the unit employed or applied in that allowance?
"A. I said that I used the unit of thirty-five and fifty cents per cubic foot.
"Q. That you do now?
"A. That I do; yes, sir.
"Q. What did you mean by stating that there was an overallowance to the P. J. Carlin Construction Company of about $8,000.00?
"A. Well, I found, I remember, that there had been, in estimating my vouchers, that there had been what I considered an overcharge of approximately $8,000.00.
"Q. How did that arise?
A. I have found since the testimony, I have looked up my files more carefully and found that Mr. Stierle, in estimating the walls above the basement floor level for the months of October, November and December, estimated those walls at $1.07 per cubic foot."

Mr. Wait: Then I skip to the third line from the bottom on page 253:

"Q. Do you mean that the allowance of $15,000.00 was the result of the unit of $1.07?
"A. And for the work for which Mr. Stierle had paid.
"Q. At what rate?
"A. $1.07.
"Q. Do you know what it would amount to, applying the proper unit which you say should be applied?
"A. I estimated that this morning very carefully, and I have to refer to my notes——
"Q. What was the total?
"A. In money?
"Q. Yes.
"A. $9,253.90."

Mr. Wait: I want to read the following from Mr. Lewis' testimony, page 320, seventeen lines from the bottom.

Mr. Paine: I object on the ground that it is incompetent and on the ground that a proper foundation has not been laid. I understand that your Honor has ruled on this point in the case of Barros vs. The Porto Rico Motor Company. In the District Courts the testimony of a witness at a former trial is clearly incompetent, particularly without any foundation being laid at all.

The Court: There is no agreement on this subject at all?

Mr. Paine: No, we had a stipulation as to Mr. Berryman's
345 testimony but not as to any other witness.

The Court: Sec. 35 of the law of Porto Rico, on evidence is to the effect that the testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter, is admissible.

Mr. Wait: Now I want to be perfectly fair, as I stated before, and I don't want to take any more time than necessary, and I will state right here that this is for the purpose——

Mr. Paine: I don't think that it is fair to state this before the jury.

(The jury is excused from the court room during the discussion.)

Mr. Wait: It is for the purpose of proving what was ruled out yesterday with respect to the bid of Purdy & Henderson here on this work. In other words, the last witness and the witness before him testified to it and I want to be perfectly fair to the Court and have the Court understand the purpose. It is to get in this record what Purdy & Henderson agreed to do this Guerini Stone Company's work for.

The Court: That was ruled out on the direct testimony?

Mr. Wait: The proposal was, yes, and I understood it was not because of any defect in the paper itself.

Mr. Paine: In the first place, I want to state and call your Honor's attention to the fact that even the local law requires a showing, as I heard it read, that the witness is dead or out of jurisdiction.

Mr. Wait: I am quite willing to show that.

Mr. Paine: That wouldn't make it good either.

The Court: I assume that could be shown.

Mr. Wait: Yes, I am ready to do that, to show that he is not here and that he is out of the jurisdiction.

The Court: We will assume that that is done. Is the testi-
346 mony that is now offered, oral testimony on the former trial or is it a deposition.

Mr. Paine: It is oral testimony on the former trial. This is not a deposition de bene esse.

Mr. Wait: I don't want to have any error creep into this case. I would rather withdraw this offer, if the Court feels that there is any dubious question in it.

The Court: Yes, I don't think it is admissible. You see down here we have had to develop a line of practice on the border line of two different systems and I construe that section rather strictly and my inclination is to think that I could not admit the testimony taken on the former trial. I will sustain the objection.

Mr. Wait: Kindly grant me an exception as a matter of form. I

don't think the issue will ever come up. I guess the defendant rests. I don't know of anything more.

The Court: The Defendant rests. What says the plaintiff? Any rebuttal?

Mr. Paine: I will ask Mr. Follett to take the stand, your Honor.

Testimony in Rebuttal.

GEO. A. FOLLETT, being re-called as a witness in behalf of the plaintiff, was duly sworn and testified as follows:

Direct examination.

By Mr. Paine:

Q. Mr. Follett, with regard to the first few stones of granite which were set and had to be removed, can you remember why that was? Why had these stones to be re-set?

A. We had to re-set the first stones that we started placing because the foundation was found to be short about three inches.

Q. Now do you remember the motor that was under Mr. Guerini's shed?

A. Yes, sir.

347 Q. Was the motor in the shed the one that ran the concrete mixer?

A. No, sir.

Q. Where was the motor that ran the concrete mixer?

A. It was directly connected with the concrete mixer which was placed along the north side of the building about the center of the building just outside the wall.

Q. Where was the shed?

A. The shed was over on the southwest corner outside of the building walls.

Q. Mr. Follett, do you remember a letter that you gave to Mr. Oaksmith or somebody for the Carlin Company in which you offered to sell him some certain tools for some twenty-five hundred odd dollars?

A. $2,334. All the tools which I offered for $2,334.00 were listed in that letter.

Q. And this list of tools and materials which you testified were worth $3,500.00, does that contain things other than the tools listed in this letter which you offered Mr. Oaksmith for $2,334.00?

A. Yes, sir; a good many other things.

Witness withdraws.

H. P. CONVERSE, being recalled as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Paine:

Q. Mr. Converse, have you estimated from the plans and specifi-

cations the number of cubic yards of concrete in the exterior walls of the building?

A. Yes, sir. 1090 cubic yards. I have checked that with my original estimate which I made up before we took this job with Guerini.

Q. Did you explain that in your direct-testimony?

A. I explained the cost of the concrete.

Q. Now, Mr. Converse, in the interview with Mr. Carlin on February 2, 1912, did Mr. Carlin say anything to you about a change in the units which were to be used by the Government Superintendent on this job in San Juan?

A. No, sir.

Witness withdraws.

The Court: The next witness.

348 Mr. Paine: All I have to do now is to read one or two things from Mr. Berryman's testimony, your Honor. I will now read in evidence that portion of the testimony of Mr. Berryman which I used in Mr. Carlin's examination.

Mr. Wait: I consent that it be considered in evidence.

The Court: I suppose you object to its being read to the jury. The objection is overruled.

Mr. Wait: Note an exception.

Mr. Paine: Page 267 of the typewritten copy of the old record: "Q. Now, Mr. Berryman, will you tell us, if you can, when it was that you first notified the Carlin Construction Company that you thought that the basis of payment was too high?

"A. It was I suppose, when the voucher was paid. I landed here on the 25th of January and the payment was due on the 31st, and I remember they gave me an estimate which they said they were in the habit of giving Mr. Stierle. It was thirty some thousand dollars, I think, if I remember correctly, and my impression is that part of that figure was for granite and part for concrete. They undoubtedly were figuring the concrete unit at $1.07, and I paid them $20,000.00, and, according to that payment, I should think that they would have known that I was disallowing the concrete figure. I must have told them at that time if I told them."

Mr. Paine: I will rest, your Honor.

Mr. Wait: I don't know what the practice is here. I have had Mr. Follett's testimony transcribed and I offer it in evidence so it can be taken to the jury room.

The Court: Well, what do you want done?

Mr. Wait: It is the Official Stenographer's minutes transcribed. I would like to have the jury have the benefit of this transcription of the testimony if they desire it, comprising Mr. Follett's testimony and I ask that it be admitted so that, together with the exhibits already offered in evidence, it may go to the jury room.

349 The Court: In that shape, the offer would be refused.

Mr. Wait: Should I call the Stenographer and have him testify that he transcribed the minutes, in order to qualify them?

The Court: No, not on that point. Our practice is that if the jury wants any part reread to them, they will come back in and the Stenographer will read it to them, but in taking out a part of the oral testimony, it amounts to laying undue weight on that point.

Mr. Wait: Not undue weight on one of my witnesses' testimony but on one of my opponent's witnesses, for which he ought to be very grateful.

The Court: If the jury want to hear it reread at any time, let them come back.

Mr. Wait: Kindly note an exception.

The testimony in question was then marked No. 20 for the defendant for identification.

Mr. Wait: I now offer Exhibit 20, for identification.

The Court: That is the same point. I hold the same way.

Mr. Wait: Note an exception. I would like to ask the Court for permission, after the verdict is rendered and there is no further use for them to have these books, Exhibits "NN," "OO" and "PP," returned to the custody of the defendant because they are books that are used in the office here at San Juan.

The Court: Is there any objection?

Mr. Paine: Of course it is on condition that they be returned if it is necessary in any connection with the case.

The Court: The Stenographer will note that.

Mr. Paine: In the course of his argument to the jury I asked Mr. Wait if he would object if I hand this copy of the bill of particulars to the jury, simply as my computation of the elements of damage taken from the testimony given on the stand. Otherwise I shall have to ask the foreman to take a pencil and take them down, because I want them to have these figures.

350

Mr. Wait: It is unusual to give papers to the jury which have not been put in evidence.

The Court: Yes, sir; unless consented to, I could not allow that to go to the jury.

Mr. Wait: I submit that whatever figures he gives them must be within the evidence.

The Court: I will state to the jury that they are at liberty to take notes but they are not bound to take notes. If they do not care to take notes, they do not have to.

Mr. Wait: I regret the necessity of making an objection to that because it seems to emphasize unduly the evidence of one side against the other.

Mr. Paine: The defendant had an equal right.

The Court: That objection will be overruled, qualified as I have by telling the jury that they do not have to do any such thing if they do not want to.

Mr. Dexter: Note an exception.

Mr. Paine: These are simply my notes of the testimony. This is not testimony but I am simply giving you the notes that I made of the testimony.

Reporter's Certificate.

I, Arthur J. Harvey, Official Reporter of the District Court of the United States for Porto Rico, hereby certify that the foregoing document, consisting of six hundred and twenty-two typewritten pages, is a true and correct transcript of all the oral testimony offered upon the trial of the case of the Guerini Stone Company versus P. J. Carlin Construction Company, together with the objections to said testimony made by counsel and the rulings thereon by the Court, and the Court's instructions to the jury, which said case was tried in the above entitled Court in, the months of May and June,
351 1916. I further certify that I reported said trial in shorthand and that I thereafter made the foregoing transcript from my shorthand notes so taken.

ARTHUR J. HARVEY,
Official Reporter.

Plaintiff's Request for Instructions.

In the District Court of the United States for Porto Rico.

No. 891. Law.

GUERINI STONE COMPANY, Plaintiff,

vs.

P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

Plaintiff respectfully requests that the Court instruct the jury as follows:

1. You are instructed that by the express terms of the 11th paragraph of the contract between the parties the defendant was under the obligation to "provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work." Applying this to the facts of the case, defendant was bound to furnish the foundation in such manner that plaintiff might build upon it without delay. And, if defendant failed to furnish the foundation in such manner, it is liable to plaintiff for loss thus caused to it.

Furthermore, in case defendant, by failing to provide labor and materials, including the foundations, delay plaintiff to the extent of preventing plaintiff from completing its work within the contract period (or at most a reasonable extension thereof) then and in that case defendant is liable to plaintiff for all reasonable expenses
352 incurred, including the unavoidable losses incident to stoppage, and also the profits, if any, which plaintiff could have made if allowed to complete the work under the contract."

Given.

P. J. HAMILTON, *Judge.*

2. "It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses o fthe party injured have been extravagant and unnecessary for the purpose of carrying out the contract."

U. S. vs. Behan, 110 U. S., 338.

Given.

P. J. HAMILTON, *Judge.*

3. You are instructed that the obligation was on defendant to make payments in accordance with the terms of the contract and, if you find that plaintiff and defendant agreed on units to be used as a basis for one or more payments and that plaintiff made demand in accordance with the contract for payment for an amount of work actually done by the plaintiff on the building in accordance with said units and defendant refused to pay 85% of such amount or an amount reasonably approximate thereto, then defendant was guilty of a breach of the contract; or, if you find that plaintiff made demand on defendant in accordance with the contract for an amount equal to the cost and reasonable value of work actually done on the building by plaintiff and defendant refused to pay 85% of such amount, or an amount reasonable approximate thereto, then defendant was guilty of breach of contract; and in either case plaintiff is entitled to recover its damages as laid down to you in this charge.

4. If you find that owing to the acts of the defendant the plaintiff was prevented from completing the work under the contract during the time set therefore by the contract, or a reasonable extension thereof, then the defendant was guilty of a breach of the contract, and justified the plaintiff in stopping work under the contract, and entitles it to recover from the defendant such damages as may be proper on the evidence, and under the instructions.

353

Given.

P. J. HAMILTON, *Judge.*

5. If you find that from the acts of defendant plaintiff was reasonably entitled to believe that defendant intended to continue committing breaches of the contract, either by continuing to refuse to pay instalments when due, or by preventing plaintiff from finishing within contract time, or a reasonable extension thereof, even though defendant's breaches did not amount to a physical obstruction or prevention of performance by plaintiff, then you can give plaintiff damages, including the profits which he may have shown that he would have made. Lake Shore vs. Richards, 152, Ill., 59; 30 L. R. A., 33.

Refused.

P. J. HAMILTON, *Judge.*

6. If you find that the plaintiff has proved expenditures in the work under the contract, the burden of proof is on the defendant to show that they are unreasonable, otherwise they will be presumed to be reasonable and proper.

U. S. vs. Bhan, 110 U. S., 338; Taylor vs. Hatch, 39 Fed., 440.

Refused.

P. J. HAMILTON, *Judge.*

7. The provisions of the contract between the P. J. Carlin Construction Company and the Guerini Stone Company, covering extensions of time beyond the term stated in the contract to the sub-contractor, is not exclusive, and does not bar the sub-contractor from other remedies.

Given.

P. J. HAMILTON, *Judge.*

8. You are instructed that the fact that the owner of this building and the party making the physical contract with the defendants for its construction was the United States Government instead of an individual makes no difference in the rights of these parties under their sub-contract, but plaintiff's rights are exactly the same as though no question of public property were involved.

Given.

P. J. HAMILTON, *Judge.*

354 9. You are instructed that the Government of the United States as a party to a building contract like the one it made with the defendant here stands on the same basis, and has no greater rights than a private individual, and modifications made in such contracts by it produce the same legal effect between the parties and privies as if made by private individuals.

Given.

P. J. HAMILTON, *Judge.*

10. I charge you that in case you find that the defendant broke its contract with the plaintiff, and find a verdict for the plaintiff, you may allow the plaintiff interest at the rate of six per cent per annum from the date of defendant's breach of the contract up to today upon the portion of plaintiff's damages which was at the time of the breach capable of being definitely ascertained by computation. You cannot, however, find for the plaintiff an amount greater than the amount demanded in his complaint as amended.

Given.

P. J. HAMILTON, *Judge.*

E. S. PAINE,
Attorney for Plaintiff.

Instructions Requested by Defendant.

In the District Court of the United States for Porto Rico.

No. 891.

GUERINI STONE COMPANY, Plaintiff,

vs.

P. J. CARLIN CONSTRUCTION Co., Defendant.

1. The Court instructs the jury that under the terms of the sub-contract executed between the parties to this suit, no precise
355 or definite time is fixed in which defendant the general contractor shall put the building or construction in condition, or ready, to receive the work of the sub-contractor.

Given.

P. J. HAMILTON, *Judge.*

2. The Court instructs the jury that the provisions of section 6 of the sub-contract, to the effect that the sub-contractor "shall and will wholly finish the said work according to the said drawings and specifications and this contract within three hundred days from the date upon which the building is ready to receive his work and after he has been notified to proceed by the general contractors" is solely for the benefit of the defendant, the general contractor, and not in any manner or form a limitation of time within which defendant, the general contractor, shall make or provide the construction or building ready to receive the work of the plaintiff, the sub-contractor.

Given.

P. J. HAMILTON, *Judge.*

3. The Court instructs the jury that when the plaintiff, the Guerini Stone Company, entered into the sub-contract with the defendant, the P. J. Carlin Construction Company, it was under the obligation to perform the said contract unless its performance was rendered impossible by the Act of God, the law, or the other party. The Court instructs you that unforeseen difficulties, however great, will not excuse the plaintiff from the performance of the said sub-contract on its part.

Refused.

P. J. HAMILTON, *Judge.*

4. The Court instructs the jury that under the evidence it cannot find that defendant caused any delay to plaintiff prior to October 16th, 1911.

Refused.

P. J. HAMILTON, *Judge.*

5. The Court instructs the jury that even if there was any delay caused by defendant to plaintiff prior to the acceptance by the latter of the option exercised by defendant to require the plaintiff to set the granite in September 1911, such an acceptance by plaintiff of said options constituted a waiver of all claims or complaints which it might theretofore have had and constituted an estoppel to
356 prevent plaintiff from claiming delay up to said date so far as relates to termination of the contract.

Given.

P. J. HAMILTON, *Judge.*

6. The Court instructs the jury that it is admitted in evidence that on the 22d day of May 1912, plaintiff elected to terminate or rescind the sub-contract with defendant. Under these circumstances you are instructed that plaintiff is not entitled to recover assumed or expected profits and can only recover for the actual value of work, less the value of any materials reasonably and necessarily employed by it in the said work, less the value of any materials remaining in its possession and less any sums already received by it from defendant.

Refused.

P. J. HAMILTON, *Judge.*

7. The Court instructs the jury that plaintiff was not justified in rescinding or terminating the sub-contract because of the alleged lapse of time.

Refused.

P. J. HAMILTON, *Judge.*

8. The Court instructs the jury that in determining the amount of money reasonably and necessarily expended by plaintiff in connection with the said work you are under no obligation to accept the amount testified to by the witnesses for the plaintiff, but you shall determine from all the evidence in the case what would be a reasonable and necessary amount for the labor and materials furnished.

Given.

P. J. HAMILTON, *Judge.*

9. The jury will not consider evidence of any facts or transactions between the parties occurring subsequently to May 22, 1912, the date the plaintiff rescinded or terminated the contract.

Given.

P. J. HAMILTON, *Judge.*

10. The Court instructs the jury that the delay of defendant to make payments on estimates, in the absence of a positive refusal to pay anything, was not ground for a rescission or termination of the contract by plaintiff. The remedy of plaintiff was, and is, to

recover interest on such deferred payments. Neither would such delay in making payments upon estimates be a cause for awarding any interest under the pleadings in the present action.

Refused.

P. J. HAMILTON, *Judge.*

11. The Court instructs the jury that as a matter of law under the evidence adduced in this case, it must find the issues herein in favor of defendant upon the cause of action attempted to be set forth against defendant in the complaint filed by plaintiff; the only matter to be decided by you is what damage if any, you may believe under the evidence in this case, defendant has suffered by reason of the abandonment by plaintiff of the plaintiff's sub-contract with defendant.

Refused.

P. J. HAMILTON, *Judge.*

12. The Court instructs the jury that as plaintiff unjustifiably rescinded or terminated the sub-contract defendant had the right under section 5 of the sub-contract to retain any and all sums due the plaintiff, if any, until the completion of the work, and to apply the same upon the cost of doing the work provided for in the sub-contract.

Refused.

P. J. HAMILTON, *Judge.*

13. The Court instructs the jury that if you believe from the evidence that defendant delayed in making payment of the estimates and requests presented by plaintiff, still, if you believe that these requests or estimates were the subject of bona fide investigation and discussion, the plaintiff was not justified in rescinding or terminating the sub-contract.

Refused.

P. J. HAMILTON, *Judge.*

14. The Court instructs the jury that if you believe from the evidence that the unit of $1.07 per cubic foot for the concrete work done by plaintiff and for which plaintiff demanded payment based upon such unit, was in excess of the unit recognized by the sub-contract for such concrete work; or if you believe from the evidence that the Government of the United States, by its representatives, established between it and the defendant a lower unit for such concrete
358 work done by plaintiff, then plaintiff was not entitled to payment for such concrete work on the basis of the said unit price of $1.07.

And you are further instructed that the fact that the defendant may, by error or miscalculation of the government, have received an overpaying from the government on account of such concrete

work done by plaintiff—such overpayment, being based upon the application of the unit of $1.07, plaintiff was not entitled to receive any part of such overpayment from defendant.

Given.

P. J. HAMILTON, *Judge.*

15. The Court instructs the jury that plaintiff's witnesses have testified that at the time it stopped work under the sub-contract, it had completed 25% of the work called for, and that it had spent a sum therefor slightly in excess of $25,000. Under these circumstances you are justified in indulging the inference that the completion of the sub-contract would have cost a sum in exceess of $100,000—and hence there would have been no profit but a loss to plaintiff, since it has assumed to do the work called for in the sub-contract for $64,750—

Therefore, even if you believe that defendant gave just cause to plaintiff to rescind the said sub-contract, the latter cannot recover for any expected profits, since there would have been none.

Refused.

P. J. HAMILTON, *Judge.*

16. The Court instructs the jury that under the sub-contract defendant is entitled to a reasonable allowance as compensation for the operation of the derricks and engine furnished by defendant to plaintiff and defendant had the right to deduct such expense from the payment to which plaintiff was entitled for work done by it. There is no evidence to contradict the evidence of the defendant, as to the reasonableness of the compensation in this respect and you shall allow the same as a deduction against the amount for which plaintiff requested payment.

Refused.

P. J. HAMILTON, *Judge.*

17. The Court instructs the jury that if you believe from the evidence that as a result of the failure of plaintiff to perform and
359 carry out the sub-contract defendant was obliged to expend a sum in excess of the sub-contract price, then defendant is entitled to recover under its counterclaim, against plaintiff, all sums reasonably and necessarily paid by it in excess of the said sub-contract price.

Refused.

P. J. HAMILTON, *Judge.*

18. The Court instructs the jury that the contract could not be modified or altered so as to increase the compensation to the plaintiff except for an adequate consideration. It is in evidence by the testimony of Mr. Converse the President of the Plaintiff Company that in making his demand for payment he stated that he wanted only what was due him under the sub-contract.

It is also in evidence by the testimony of the President of the Defendant Company that the latter paid plaintiff for all work done and materials furnished in accordance with his request or application upon the basis of 40¢ per square foot of granite, which was the contract price—$10—per cubic yard on February 2d, and $6.70 per cubic yard March 9th, 1912, and that he did not make any deduction for or on account of engine hire, engineer wages and materials, including coal, oil and waste.

Refused.

P. J. HAMILTON, *Judge.*

19. The contract provided for delays due to failure of defendant to provide labor and materials and provided that defendant should reimburse plaintiff for its loss; that such express provision in the contract shows that delays by defendant were contemplated by the parties and were anticipated and provided for.

Under such provision of the contract ordinary or usual delays in building constructions by the defendant would not constitute a breach of the contract on the part of the defendant.

That only unusual and extraordinary delays by defendant, such as would not under the circumstances and conditions surrounding the parties have been reasonably contemplated or anticipated by the parties, would constitute a breach by defendant of its contract.

Given.

P. J. HAMILTON, *Judge.*

360 20. Breaches of a contract may be waived or condoned by either party and even if you should believe that the defendant had given cause to plaintiff to complain and to withdraw from the sub-contract, if you find, however, that the plaintiff continued with the work for many months, thereafter, such delay may not be made a cause for termination of the contract by plaintiff after it failed for a long period of time to terminate such contract.

Given.

P. J. HAMILTON, *Judge.*

21. The act of plaintiff in undertaking and doing the setting of granite under the option exercised by defendant sometime prior to September 15, 1911, and without notice to defendant of any complaint as to delay or damages suffered by defendant constituted a waiver of any such delay or damage to plaintiff prior thereto.

Refused. P. J. HAMILTON, *Judge.*

22. The act of plaintiff, in soliciting and making a proposal to set the granite and the steel erection to the concrete work, is evidence of a waiver on the part of the plaintiff of any delays that may have occurred prior to said proposal of August 17, 1911.

Refused. P. J. HAMILTON, *Judge.*

23. If the plaintiff had a just cause for rescission of its contract, or felt entitled to damages for delay on or before September 15, 1911, it was incumbent upon plaintiff to give notice to defendant of its intention to rescind when called upon to do the additional work of setting of granite on or about Sept. 15, 1911, as aforesaid.

Given.

P. J. HAMILTON, *Judge.*

24. If plaintiff contributed to the delay of which it complains, it cannot take advantage of such delay as an excuse for the termination of its contract.

The plaintiff owed the same duty not to delay defendant's work as did defendant owe to plaintiff.

Given.

P. J. HAMILTON, *Judge.*

361 25. The contract provided that should the sub-contractor at any time refuse or neglect to supply workman and materials or fail to prosecute the work with promptness and diligence that the defendant should be at liberty after three days' notice to sub-contractor to provide any such labor or materials and to deduct the cost thereof from any money due plaintiff under the contract, and the defendant would take possession of plaintiff's plant of all materials and appliances of every kind and to employ others to finish the work and the plaintiff was not by the terms of said contract entitled to any further payment under the contract until the work was finished and then only to any excess of the contract price over and above the total cost of the work to defendant and the cost to the defendant was to include not only the expense of furnishing the materials and work, but also any damages incurred by defendants.

Refused.

P. J. HAMILTON, *Judge.*

26. Plaintiff was not entitled to any monthly or progress payments until it had complied with those terms of its contract which entitled it to payment.

The contract between the parties required as a condition to payment that the work should be to the satisfaction and under the direction of the defendant and the architect and agreeably to the drawings and specifications.

Plaintiff must show and prove that the work was performed to the reasonable satisfaction of the defendants and the architect, before they are entitled to payments on account.

Refused.

P. J. HAMILTON, *Judge.*

27. No monthly or progress payments were due to the plaintiff from the defendant until a written requisition, on a form supplied

by the defendant, had been made by plaintiff to defendant, which first application was made Dec. 30, 1911.

The withholding by defendant of a part of the monthly or progress payment due January 11, 1912 and of a substantial part of a payment due March 21st, to May 22d, 1912, is not a cause for a termination of the contract by plaintiff; nor will said withholding of payments give to plaintiff a right to prospective profits as for a breach of the contract on the part of defendant.

362

Refused.

P. J. HAMILTON, *Judge.*

28. You are instructed that defendant has introduced evidence herein showing that it made a contract with A. Guerini for doing the work which plaintiff had agreed to do and that defendant paid from Nov. 20, 1912 to Nov. 23, 1913 on account of said work, the sum of $78,450.83 for a portion of such work.

Therefore, if you believe that plaintiff, without reasonable cause and by premature action rescinded its contract, you may allow to defendant the sum so paid by it aforesaid, deducting therefrom such sums as you may find were reasonably expended by defendant to plaintiff in this work after making due allowance for sums already received by plaintiff, and less the value of materials remaining in possession of plaintiff, when it terminated the contract.

Refused. P. J. HAMILTON, *Judge.*

29. The Court instructs the jury that in determining whether plaintiff was justified in rescinding the sub-contract you shall consider whether the delay alleged, if any, was merely a suspension of a temporary character, and if there existed facts upon which to base the reasonable assumption that the contractor was not at fault and that the work would be continued.

In this event, if you should so find, then plaintiff was not justified in rescinding the contract.

Refused. P. J. HAMILTON, *Judge.*

F. H. DEXTER,
Attorney for Defendant.

363 *Court's Instructions to the Jury.*

In the District Court of the United States for Porto Rico.

No. 891. Law.

GUERINI STONE COMPANY

vs.

P. J. CARLIN CONSTRUCTION CO.

GENTLEMEN OF THE JURY: I am sure that we have all taken a great deal of interest in this case. It has been a pleasure to hear the coun-

sel on both sides. The case has some novel features and I have for my own part endeavored not to interrupt counsel in their presentation of the case. They are both from another Bar, The New York Bar, and the contract is a New York contract, and I have not interrupted as I possibly would have done if they had been living here and expounding a local contract. They had come a long distance and they have presented the case in their own way. It has been well done and fully done. The result rests with you. With me to a limited extent, but the law of this case has been settled pretty much by the Supreme Court of the United States, and it is mainly a question of fact, which, of course, is your province.

This is a contract of peculiar interest to us here because it relates to the Federal Court in which we work, in which you have been working with me for the past eight weeks I think. The amount is large, the features of the contract are unusual, not familiar to us; but, after all, the principles are the same as those of any other contract which you have been enforcing during this term of Court.

"A contract is an agreement by two people to do a certain thing for a certain consideration. That is all a contract is. And it may be for the making of a pair of shoes, or it may be to put up a federal building. The principle is identically the same. When people enter into a contract, they have got to carry it out. If little things occur in the course of a large contract, it does not justify either one side or
364 the other in throwing up the contract. If he does, he is liable in damages in his turn, but there is, of course, a limit to forbearance in a case of that sort and in all cases." A contract, if it is broken in a material part, in a substantial part, so that it does not make the same contract, that is the test, it can be thrown up by the party who is injured. He has a right to do it. There are two ways of doing it. He may rescind the contract and seek what is called a quantum meruit of what he has earned on it. That is one way of getting at it. Another way is to take the contract as a whole, terminate it, and then the measure of damages is double. The man who is injured, if that be the case, is entitled to be put back where he was. You can see that is the substance, that is the object of all law. The object is to put a man back where he was, to reimburse him, and when it comes to a violated contract, there are two lines of recovery. He is entitled to recover what he has lawfully expended in trying to carry out his contract. That would cover a number of things. It would cover his own labor. It would cover the labor that he has put on the job. It would cover the material that he has supplied, and perhaps one or two other things, but that would be the substantial feature of it on that line. The other line of recovery is that where he can show that he would have made a profit, he is entitled to the profit that he has been prevented from obtaining. He can recover what he has actually lost in money or labor or material and he can recover what he would have made if the other party had permitted him to carry on the contract.

Now on May 22, 1912, there happened here either on this ground or somewhere connected with it, a certain event. Messrs. Carlin & Company had obtained a contract from the government on December

12th, I think it was, 1910, for the erection of this building. They had seen fit not to build or put up the whole building themselves, but to sub-contract a good deal of it, everything you may say above the foundations, except the furnishings, windows, etc. And on December 16th of this same year and the same month, they had made a sub-contract or some arrangement with a man called Guerini, who seems to have been an artist, and he had undertaken to do pretty much all the shell, as it has been expressed, of the building.

In that contract which is in evidence, dated the 16th of December, 1910,—it is this printed contract which you have before you—the Carlin Construction Company made the following arrangements with the Guerini Stone Company. Now Mr. Guerini, in the meantime after he had made his arrangement with Carlin, had interested Converse & Company, I believe the name is, of Boston, and they had formed a corporation of their own called the Guerini Stone Company. How much Converse was interested and how much Guerini was interested is not before us. It was a corporation, and the Carlin Company made a sub-contract for the purposes indicated with the Guerini Stone Company on the 16th of December, 1910. The contract was to furnish and set in position, including the concrete backing, all the imitation sandstone, and to construct the interior concrete walls, concrete floors, concrete roof, backing the granite construction, enclosing all the I-beams for the San Juan Postoffice, etc. A good deal of matter you will find in fine print. It was provided that when the sub-contractor began work, the sub-contractor shall and will proceed with the said work, and every part and detail thereof in a prompt and diligent manner, and shall and will do the several parts thereof at such times and in such order as the general contractors or architect may direct. The architect was to be the government architect to whom Carlin & Company were responsible, but the sub-contractor had nothing to do with the government. What the government might have done is not within the scope of this contract, except that the sub-contractor was to act upon the plans and specifications furnished by the contract between the government and the Carlin Company. He shall and will wholly finish the said work according to the said drawings and specifications, and this contract, in 300 days from the date upon which the building is ready to receive his work and after he has been notified to proceed by the general contractors, and in default thereof the sub-contractor shall pay to the general contractor the sum of twenty dollars for every day thereafter that the work shall remain unfinished, as and for liquidated damages. The sub-contractor further agrees to begin work at the building within three days from the time that he is notified by the general contractors that the building is ready to receive the work. Now that is the time that this company was to do the work.

The price agreed was $64,750.00, and this was to be paid to the Guerini Stone Company in monthly payments on account, not to exceed the amount of eighty-five per cent of the cost of the work already erected in the building, and provided that the sub-contractor furnishes to the general contractor a written requisition on a form to

be supplied by the general contractor. And somewhere else there is a provision that the work was to be to the satisfaction of the general contractor. There is also near the end of the contract an option naming two or three things, one of which is: also set in position all the granite walls, steps, balusters, buttresses and curbing, and all other granite work, for the sum of 40¢ a square foot surface. The above items to be at the option of the general contractor. That option was exercised so that this contract as it stands, is for two things; to erect this building as declared in the first part, to furnish and set in position certain stone, and also to place the granite that you find in the first story of this building.

Here is an agreement by the general contractor. The general contractor agrees to furnish two derricks complete, and one engine, the sub-contractor to pay for all costs of operating same when used by him.

Now that is the contract. The facts seem to be that in January, 1911—now this contract was the 16th of December, 1910—the next month a telegram was sent to the Guerini Company and what the meaning of that telegram was, is for you to determine in view of all the circumstances of the case. Was it a notice to them to start work or was it simply a general notice in connection with the work? The work that was to be done under this sub-contract by the Guerini Company was all above the foundation. They had nothing to do with the foundation. If there was any defect discovered in the foundation afterwards, it would be something that the Guerini Company were not responsible for, and it would make no difference whether
367 a defect was there by default of the general contractor or by accident. It would make no difference so far as the Guerini Company was concerned, and you will find that is the most important point in the case.

It seems that Mr. Guerini and perhaps some men came down here and the foundations were practically ready in the middle of the year, perhaps along about July. You will recollect the facts better than I do. On September 15th was another communication between the parties and that is one of the dates you may determine or may not determine was that upon which the notice called for in the contract to begin work is to be dated from, September 15th. You are to take that matter and determine whether that was a notice to begin work or whether it began farther back. In October you will find certain photographs were taken and I think they are in evidence. They will show the state of the work at that time. In the meantime had come the arrangement to exercise the granite option, and on either October 13th or October 16th the placing of the granite under this contract began. And the next month there seem to have been a good many accidents and apparently disagreements between Mr. Guerini and the Carlin Construction Company. The result was that in December Guerini was called back to Boston and others were put here. It is the contention of the defendants that Guerini was the main man on the job for the Guerini Stone Company. It is the contention of the Guerini Stone Company that Guerini was not the main man, that the main man was Mr. Follett who was also here. But at all events, in December Mr. Guerini went

back to Boston. Now that ends the year 1911. In 1912, I think the undisputed evidence is that by January a substantial amount of granite was finished, in January of 1912. In the meantime had come the question as to payments. You will find that some two or three payments were made but that there was a difference of opinion between the parties as to what was due, and on February 2d or thereabouts, you will find that there was an interview between Mr. Converse of the Guerini Stone Company and Mr. Carlin for the Carlin Company, that will be of great importance in this case. Mr.
368 Converse contends that at that time the Carlin Company agreed to pay him according to certain units which were substantially what the Carlin Company were being paid by the government. Mr. Carlin, on the other hand, contends that that was not so at all; that he was to be paid upon another basis.

I charge you, of course, that it takes two to make a contract. It was the right of these two gentlemen of these two companies to agree upon a modus operandi. A written contract in the nature of the case cannot specify all the details that would come up from day to day, ways of doing different things, so that if these two gentlemen on February 2d or any other time agreed upon a unit upon which payments were to be made, that is an important point. Payments should be made according to that basis. But if you find that they misunderstood each other and did not agree upon any operation of the contract, then the basis of payment in this case would be the basis stated in the main contract itself, and that was this: that the Guerini Stone Company were to be paid monthly payments not exceeding 85% of the work actually done and put into the building, provided vouchers in a certain form were furnished to the Carlin Company twelve days, or something like that, before, and that the work was to the satisfaction of the Carlin Company. Now if there is no variation of it, that was what the agreement was. The difficulty you will see is in determining what work was actually done where only a certain part was done, but that is a part of the contract unless it was changed in the way I have spoken of. You will have to figure out and see whether the Carlin Company did carry out the contract as to payments.

In February, I think it was, there seems to have happened an accident of some kind to the foundations. There seems to have been a crack discovered somewhere, I think, on the north side, and that was reported to Washington and Washington sent men here who investigated it with the result that, I think, on March 9th, 1912, it was directed that the work stop. Now that is the crucial date in the case. On March 9th, the government ordered the work stopped. Now what was the effect of that upon the two parties to this
369 contract? It makes no difference what the effect of it was so far as Carlin was concerned in the dealing of the Carlin Company with the government. That is not before you at all. You have got nothing to do with that. And I charge you that whatever defect there was, if there was a defect which led to this stoppage, and the stoppage whether there was any defect or not makes no difference to the Guerini Stone Company. They were entitled by their contract

to proceed with their work when the foundation was furnished to them, and, if an imperfect foundation was put up, whether through fault of the defendant or whether there was some old Spanish fortification underneath, it makes no difference so far as the Guerini Stone Company was concerned. If a proper foundation was not furnished to them and the government stopped work on March 9th and there was no reasonable prospect of their being able to begin work anew within a reasonable time, I charge you that that would constitute on the part of the Carlin Company a substantial breach of the contract with the Guerini Stone Company. If it was something that could be rectified in a few days, that would be a different matter. The contract contemplates a delay of a few days at a time. All large contracts must contemplate that. It is impossible to foresee beforehand all the delays that may occur, but if it was evident to the parties that there would be a long delay or an indefinite delay or if it was evident that it was impossible to tell when the work could be begun again, then the Guerini Stone Company had a right to terminate the contract. They were not bound to wait around here and await the pleasure of the government, pleasure no doubt properly exercised, as to the beginning of the work.

It seems that some arrangement was made between the government and the Carlin Company as to underpinning the work and this was arranged somewhere about May. But if you think from the evidence that that was not a matter of a few days, that it was uncertain when that would be finished, then the Guerini Stone Company had the right to do what they did on May 22d, that is, to give notice to the Carlin Company that the contract, so far as they were concerned, was terminated and that they would hold the Carlin Company
370 responsible for the damages. But I am not charging you, of course, that those facts are so. I am simply laying those facts before you.

Those are the main dates of the case with which you are concerned. What happened after May 22d would make very little difference to you. We must all determine our course upon what the facts are. Our weal for better or for worse, sometimes our eternal weal, is to be determined by what we do at a certain time and we have a right to act upon what is the case then. So it would not make any difference what happened after May 22d if the plaintiff was right on May 22d. If it was not right on May 22d, it would make a great deal of difference.

Now on May 22d this contract was terminated by the Guerini Stone Company and one of two things resulted. The result, if the Guerini Stone Company is correct, is that they must be repaid for the expenditures which they laid out in connection with this work, all told, less whatever material was left on hand and could be utilized. Or, if it is in evidence before you that certain material, that is, plant, was to be turned over to the Carlin Company and the Carlin Company used it, of course the Carlin Company ought to pay for that too. And profits if they are shown.

That is one side, but this is a double barreled suit. This is not only a suit by the Guerini Stone Company against the Carlin Com-

pany. If I have the amounts correct, which are in the complaint, the plaintiff sues for $45,611.09. That will be the limit to which you could go in any event.

On the other hand, suppose that the Guerini Company did not have the right, it was no right under the circumstances, to terminate the contract when they did, then they not only lose whatever they put into it, but, by the very words of their contract, they are bound to pay the Carlin Company whatever the Carlin Company is out by not having the contract carried through, the usual agreement, of course. So you see it is of vital importance to determinate who was to blame in terminating this contract on May 22d.

I need not go into the usual directions because you have all been jurors with me. You know that the burden of proof is on the
371 plaintiff to prove his case, that is, the Guerini Stone Company, to prove that he had a right to declare this contract terminated and to have what damages he has suffered. The burden is on it to prove that.

On the other hand, if you think that the Carlin Company were the ones who were injured in this matter, the burden is on the Carlin Company to show what they have suffered. You will take up those two contingencies. Either one must be proved by a preponderance of the testimony.

Perhaps the leading case, certainly a leading case on this subject, is that of the United States versus Behan, 110 U. S., 338. I will just cite the head note because it is the law of this and a good many other cases. "When one party enters upon the performance of a contract, and incurs expense therein, and being willing to perform, is, without fault of his own, prevented by the other party from performing, his loss will consist of two distinct items of damage: 1st, his outlay and expenses, less the value of materials on hand: 2d, the profits he might have realized by performance, which profits are related to the outlays and include them and something more. The first item he may recover in all cases, unless the other party can show the contrary; and the failure to prove profits will not prevent him from recovering it. The second he may recover when the profits are the direct fruit of the contract, and not too remote or speculative. In an action for breach of a contract by wrongfully putting an end to it, the party committing the wrong is estopped from denying that the other party has been damaged to the extent of his actual loss and outlay fairly incurred."

Now one or two things about the contract. It is, as you know, the function of the Court to say what is the meaning of a written contract and it is for you to apply it otherwise. The contract says that work shall be begun upon three days' notice, etc. You are to determine when that notice was given. The payment provided for is 85% of the work put into the building, but it is to be to the satisfaction of the general contractor. I charge you that that is to be reasonably construed. It does not mean that Carlin or the defendant company can just say: I will not approve this
372 voucher. If it is shown that there was 85% done, or whatever is shown to have been done, to the extent of 85% the Carlins

are bound to pay monthly, provided the proper voucher has been furnished. It is for you to say whether there is such proof in the case. But the satisfaction of the Carlin Company is to be a reasonable satisfaction.

Such is the contract and such are the main features of the case. I want to say that in going over these facts I do not mean to state, I have no right to say that the dates and the facts are exactly as I have mentioned them. They are, I think, approximately so, but it is for you to say. I am mentioning these things simply to oblige you; that is all. If I am mistaken in any fact which I have mentioned, it is for you to correct me and for you to decide what are the facts, not for me, but I give them as they occur to me.

There are two things in this case. Was the termination of the contract by the plaintiff on May 22d rightfully done? That is the first question before you talk about damages. Was the plaintiff right in terminating the contract? The question whether the plaintiff rightfully did that means that he could only do it if the defendant had himself broken the contract.

A contract, as I explained to you, can be terminated only when some substantial part of it has been broken and it is sometimes quite difficult to draw the line, but I charge you that there are two or three things which may be taken into account by you as a breaking of this contract, that is, two or three lines of proof which you may or may not think amount to a breaking of this contract by the Carlin Company. In the first place, if the garnite was not furnished in sufficient quantities to do the work, if the granite was simply furnished in such quantities that it delayed the work, if that was all, and the Guerini Stone Company went on and put the granite in place, they waived the question of delay so far as breaking the contract was concerned. It would come into play afterwards in the other branch of the case as to damages, but if you find that the Guerini Stone Company accepted the granite and put it in place, they cannot on May 22d allege that as a ground for saying that the Carlin Company had broken the contract.

378 On the other hand, if the payments were not properly made, that may amount, if it was a substantial lack of payment, default in payment, to breaking the contract. A contract like this is not made for fun or the honor of putting up a building. That is not it. A contractor does certain work in order to secure certain money just like everybody else who does certain work in order to get certain pay. And if there is a substantial failure, amounting substantially to the withholding of the whole payment, not necessarily the whole payment, but the bulk of the payment, a man is not bound to go on with a contract under those conditions. You will find that that will depend a great deal upon the question that I called your attention to, whether there was an agreement as to units or not. If there was an agreement as to units, you will have to take one view of the case, and if you find that there was not, you will have to take another view of the case as to the question of payments. I call it to your attention as being one of the grounds which may or may not exist for Guerini declaring that Carlin had broken this contract.

As to the matter of foundations, if you find that the Carlin Company failed to furnish the Guerini Company with foundations upon which to put their work, and on May 22d it was in such indefinite shape that the Guerini Stone Company could not tell when they could begin their work, that was unintentional no doubt, but still it was a breach of the contract between the Guerini Company and the Carlin Company that would justify the Guerini Company in declaring the contract at an end. That, however, is for you to determine. That is the question of the termination of the contract, whether the Guerini Company had the right on May 22d to terminate the contract. I leave that branch of the case in your hands.

Supposing they did have the right, the remaining question would be the one of damages, and, as I stated, that is mainly one of reimbursement. The Supreme Court has declared in the Behan case and also in this case when it was before the Supreme Court, that the question of damages—before I get to that, however, as to the question of payment. If you find that the defendant failed to make payments as called for by the contract, not over 85% and
374 not otherwise in pursuance *to* the contract, on account of work done by the plaintiff in accordance with the terms of the contract, such failure constitutes a breach of contract on the part of the defendant, and justified the plaintiff in stopping work under the contract, and entitles it to recovery from the defendant of damages.

Returning now to the question of damages, supposing the first point to be settled in your minds, which I do not direct you at all is settled, in estimating the recovery to which the plaintiff is entitled, if you find he was justified in terminating the contract as he did on May 22 upon the principles above given you, you can consider the reasonable expenditures incurred by the plaintiff, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract. So the different items that you may, if you come to the question, take into account, are the outlays less the material on hand, the amount of work actually performed and the profits, if you find there were any which were not speculative. The measure of profits is the contract price less what is shown to you as the expense of carrying out the contract, if that is shown to you to your satisfaction.

I think that will substantially cover the case. There are, however, a number of charges asked, which it is my duty to give so far as I agree with them.

If you find that, owing to the acts of the defendant, the plaintiff was prevented from completing the work under the contract during the time set therefor by the contract, or a reasonable extension thereof, then the defendant was guilty of a breach of the contract, and justified the plaintiff in stopping work under the contract, and entitles it to recover from the defendant such damages as may be proper on the evidence and on the instructions.

The provision of the contract between the P. J. Carlin Construction Company and the Guerini Stone Company, covering extensions of time beyond the term stated in the contract to the sub-
375 contractor, is not exclusive, and does not bar the sub-contractor from other remedies.

You are instructed that the fact that the owner of this building and the party making the principal contract with the defendants for its construction was the United States Government instead of an individual makes no difference in the rights of these parties under their sub-contract, but plaintiff's rights are exactly the same as though no question of public property were involved.

You are instructed that the Government of the United States as a party to a building contract like the one it made with the defendant here stands on the same basis, and has no greater rights than a private individual, and modifications made in such contracts by it produce the same legal effect between parties and privies as if made by private individuals.

In case you find that the defendant broke its contract with the plaintiff and find a verdict for the plaintiff, you may allow the plaintiff interest at the rate of six per cent per annum from the date of defendant's breach of the contract up to today upon that portion of plaintiff's damages which was at the time of the breach capable of being definitely ascertained by computation. You cannot, however, find for the plaintiff an amount greater that the amount demanded in his complaint as amended.

"You are instructed that by the express terms of the 11th paragraph of the contract between the parties, the defendant was under the obligation to 'provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work.' Applying this to the facts of the case, defendant was bound to furnish the foundation in such manner that plaintiff might build upon it without delay. And, if defendant failed to furnish the foundation in such manner, it is liable to plaintiff for loss thus caused to it." "Furthermore, in case defendant, by failing to provide labor and materials, including the foundation, delayed plaintiff to the extent of preventing plaintiff from completing its work within the contract period, then and in that case, defendant is liable to plaintiff for all reasonable expenses incurred, including the unavoid-
376 able losses incident to stoppage, and also the profits, if any, which plaintiff could have made if allowed to complete the work under the contract."

The Court instructs the jury that under the terms of the sub-contract executed between the parties to this suit, no precise or definite time is fixed in which defendant, the general contractor, shall put the building or construction in condition, or ready, to receive the work of the sub-contractor.

The Court instructs the jury that the provisions of section 6 of the sub-contract, to the effect that the sub-contractor "shall and will wholly finish the said work according to the said drawings and specifications and this contract within three hundred days from the date upon which the building is ready to receive his work and after he

has been notified to proceed by the general contractors," is solely for the benefit of the defendant, the general contractor, and not in any manner or form a limitation of the time within which defendant, the general contractor, shall make or provide the construction or building ready to receive the work of the plaintiff, the sub-contractor.

The Court instructs the jury that in determining the amount delay caused by defendant to plaintiff prior to the acceptance by the latter of the option exercised by the defendant to require the plaintiff to set the granite in September, 1911, such acceptance by plaintiff of said option constituted a waiver of all claims or complaints which it might theretofore have had, and constituted an estoppel to prevent plaintiff from claiming delay up to said date so far as relates to termination of the contract.

The Court instructs the jury that in determining the amount of money reasonably and necessarily expended by plaintiff in connection with the said work, you are under no obligation to accept the amount testified to by the witnesses for the plaintiff, but you shall determine from all the evidence in case what would be reasonable and necessary amount for the labor and materials furnished.

The jury will not consider evidence of any facts or transactions between the parties occurring subsequently to May 22, 1912,
377 the date that plaintiff rescinded or terminated the contract.

The contract provided for delays due to failure of defendant to provide labor and materials and provided that defendant should reimburse plaintiff for its loss. This shows that delays by the defendant were contemplated by the parties. That alone would not constitute a breach of the contract unless it amounted to a substantial ending of the contract. Only unusual and extraordinary delays by the defendant, such as would not, under the circumstances and conditions surrounding the parties, have been reasonably contemplated or anticipated by the parties, would constitute a breach by defendant of its contract.

Breaches of contract may be waived or condoned by either party, and even if you should believe that the defendant had given cause to plaintiff to complain and to withdraw from the sub-contract, if you find, however, that the plaintiff continued with the work for many months thereafter, such delay may not be made a cause for the termination of the contract by plaintiff after it failed for a long period of time to terminate such contract.

If the plaintiff had a just cause for rescission of its contract, or felt entitled to damages for delay on or before September 15, 1911, it was incumbent upon plaintiff to give notice to defendant of its intention to rescind when called upon to do the additional work of setting of the granite on or about September 15, 1911.

If plaintiff contributed to the delay of which it complains, it cannot take advantage of it. The plaintiff owed the same duty not to delay defendant's work as defendant owed to plaintiff.

Plaintiff must show and prove that the work was performed to the reasonable satisfaction of the defendants and the architect, before it is entitled to payments on account.

I think those are substantially the charges that are asked. Are there any exceptions?

An exception is allowed each party to each charge given at the instance of the opposite party; and to both parties to such charges as were requested by them and refused by the Court.

378 Mr. Dexter: I understand there was no exception taken by counsel before leaving, to your Honor's charge.

The Court: I told both counsel that I would allow exceptions in that way.

Mr. Dexter: But I mean as to your Honor's oral charge.

The Court: No.

Mr. Dexter: The record shows that no exception was taken to that. I will ask on behalf of the defendant an exception, your Honor, to the refusal to give instructions as submitted by the defendant.

Also to the action of his Honor in modifying and giving certain instructions as requested by defendant.

Also in giving all instructions requested by plaintiff.

Defendant also excepts to the following portions of the verbal charge: in the first place, I ask your Honor to qualify the instruction just given, which I assume was given at the request of the defendant, but as expressed by your Honor in the following words: that the jury will not consider evidence of transactions between the parties after May 22, 1912.

The Court: That was your charge.

Mr. Dexter: I ask your Honor to qualify that: except in connection with the counterclaim of defendant in the event that you believe that the defendant has a right to recover. Because the jury might get the idea that nothing at all was to be considered after that time.

The Court: Yes, that would be so. Of course, after May 22d you may consider whatever evidence there may be in connection with the counterclaim, that is, the claim of the Carlin Company of what they paid out to make good what the Guerini Stone Company should have done. I said that you should not consider anything after May 22d. I meant as to the Guerini Stone Company. What happened after that time would not concern them, but it would concern the Carlin Company.

Mr. Dexter: Defendant also excepts to your Honor's charge to the effect that a substantial lack of payment by the defendant to the plaintiff would be a cause for a breach.

The Court: Yes, the exception is allowed.

379 Mr. Dexter: Defendant also excepts to the charge of the Court insofar as it allows the jury to consider damages in excess of quantum meruit.

The Court: Yes, that exception is allowed.

Mr. Dexter: Also to the part of the charge to the effect that the stopping of the work on the foundation—I couldn't get your Honor's exact words—whether defects existed or not, would make no difference to the plaintiff.

The Court: Yes, whatever I said on that point. I do not think I said that.

Mr. Dexter: To that part of the charge to the effect that, if proper foundations were not made and there was no reasonable prospect that the work would be resumed soon—I will get exact language afterwards—then plaintiff had a right to break the contract.

The Court: The exception is allowed.

Mr. Dexter: To that part of the charge to the effect that if plaintiff believed that it would take a long time to repair the foundation, it could break the contract.

The Court: The exception is allowed.

Mr. Dexter: To that part of the charge in which the Court read from the case of the United States versus Behan, 110 U. S., 338, in that the decision also covered the case of the unwarranted breaking of a contract and the limitation of damages to a quantum meruit in such case.

The Court: The exception is allowed.

Mr. Dexter: To that part of the charge to the effect that if the jury find that the defendant failed to provide foundations and the plaintiff did not know when the foundations would be ready, plaintiff could terminate the contract.

The Court: Whatever I said on that point.

Mr. Dexter: To that part of the charge to the effect that if the plaintiff had the right to terminate the contract under the authority of the Behan case, that the measure of damages would be not only the expenses incurred by the plaintiff, but also reasonable profits.

That is all I can recall.

The Court: Gentlemen, of course you understand what is
380 sometimes overlooked, that you are to find simply one verdict.

You will select your foreman and come to some conclusion, and, if you find for the plaintiff, your verdict will be: we, the jury, find for the plaintiff and assess its damages in the sum of blank dollars and cents without any separate items, and the same way if you find for the defendant. If you think that the plaintiff is entitled to recover anything, you will say: we, the jury, find for the plaintiff and assess its damages at whatever it may be. But if you think on the counterclaim that the defendant is entitled to recover anything, you will say: we, the jury, find for the defendant and assess its damages at whatever it may be.

You will now retire, gentlemen.

The jury thereupon retired to consider of their verdict and on the following morning, June 7, 1916, returned into Court with a sealed verdict reading as follows:

We, the jury, find for the plaintiff and assess their damages in the sum of $35,873.09 with interest.

NEWTON L. REED, *Foreman.*

Mr. Neagle: There is no date mentioned in the verdict from which interest shall run and I take it that, unless Mr. Dexter consents that he or I or the Court shall compute the interest, the computation of interest must be made by the jury.

The Court: Have you any suggestion to make about that?

Mr. Dexter: None, your Honor.

Mr. Neagle: Then I ask your Honor to direct the jury to withdraw again and to state to the Court in its verdict the date from which the interest is to be computed or to state the full amount of interest that they find.

The Court: Yes, I think that should be done. The verdict as it is at present is not quite clear. It is probably a clerical error, but it should be made clear. Gentlemen, I shall ask you to either retire or from the box to indicate from what time you intended to
381 have interest run. You say $35,873.09 with interest but you do not indicate the date from which it is to run. Of course you do not say to the present because that would be the law anyhow.

Mr. Neagle: And that the jury also compute the interest, Mr. Dexter not having consented that, after the date has been fixed, it may be computed either by the Court or by counsel.

The Court: Yes, that would be proper. In other words, gentlemen your verdict should be for a fixed amount.

The Foreman: The idea of the jury I know was that it should run from the time of the cessation of the connection between the two companies.

The Court: You will have to fix that in writing. From whatever date it was your intention that the interest should run, you figure the interest from that date yourselves.

Mr. Neagle: I ask you Honor to instruct them that they need not fix the date, but they may find a sum for interest and add it to the sum found.

The Court: That is the right way. Your verdict is, we will say, $36,000.00, or whatever it will be, the $35,000.00 plus the interest that you have in mind. Just fix the amount.

The Foreman: Will your Honor instruct us as to the rate of interest?

The Court: Six per cent; I think there is no doubt about that, whether it is in New York or Porto Rico.

The jury thereupon retired to further consideration of their verdict and later returned into Court with a verdict reading as follows: we, the jury, find for the plaintiff and assess their damages in the sum of $35,873.09, with interest $8,609.54, total $44,482.63.

Mr. Dexter: Will your Honor permit a question to the foreman as to the date from which that interest was computed?

The Court: You may poll the jury, if you wish.

Mr. Neagle: I object on the ground that the jury has brought in a verdict in accordance with the Court's instructions, and what date they took is not a question in the case. The computation of interest and the rate not in excess of the legal rate, and the time are
382 wholly for the jury. It is not a special verdict.

The Court: Mr. Dexter, I will allow you to ask this one question of each juror, whether it is his verdict.

Mr. Dexter: I intend on behalf of the defendant to poll the jury through its foreman as to the time of the computation of the interest.

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The Court: No, sir, that will have to speak for itself. It is six per-cent and you can figure back what it is. You may ask them simply as to whether it is their verdict; that is all.

Mr. Dexter: Allow an exception, your Honor.

The Court: Mr. Clerk, you will receive and entered the verdict as the verdict in the case.

[Journal Entry, June 8th, 1916.]

This day come the jury into Court in charge of the United States Marshal and in response to the question of the Court in that regard, say that they have agreed upon a verdict and hand the Court a sealed verdict which is opened and is as follows, to wit:

Verdict.

"We the Jury find for the Plaintiff- and assess their damages in the sum of $35,873 *Dollars* .09 cents with interest.

NEWTON L. REED, *Foreman.*"

Whereupon upon motion of attorney for plaintiff the jury is instructed by the Court to retire to their room again to figure out and to state in their verdict the amount of interest they find. Whereupon the jury retire and thereafter return into Court the verdict as follows, to wit:

Vrdict.

"We, the Jury, find for the plaintiff- and assess their damages in the sum of $35,873 *Dollars* .09 Cents with interest $8,609.54—Total $44,482.63.

NEWTON L. REED, *Foreman.*"

383 which verdict is read by the clerk and the jury being asked if that is their verdict, they all answer that it is. Thereupon the clerk is directed to file and enter of record the verdict and the jury is discharged from further consideration of the case.

Judgment.

It is therefore considered and adjudged by the Court that the plaintiff herein Guerini Stone Company, do have and recover from the defendant, P. J. Carlin Construction Company the sum of Forty-four Thousand four hundred eighty-two dollars sixty-three cents ($44,-482.63) with interest thereon at 6% from this date until paid and the costs of the suit to be taxed.

Plaintiff's Exhibit 1.

Contract between the plaintiff and defendant dated December 16, 1910, the breach and termination of which is the subject of the

action is annexed to the Complaint, and is printed in the Record at page 12.

Plaintiff's Exhibit 2.

San Juan Office, March 9, 1912.

P. J. Carlin Construction Co., San Juan, P. R.

GENTLEMEN: We have been informed in a conversation with your Mr. Oaksmith to-day that the Supt. of Construction, Mr. Berryman, has received a telegram from the Federal authorities at Washington stating that they have notified the Carlin Construc-
384 tion Co. at New York to suspend all operations on the San Juan P. O. & Court House Building pending further investigation by them of the foundations.

We have not as yet received written instructions from you as to whether we shall or shall not stop our work. Kindly send instructions at once.

If we discontinue our work we shall have a part of our force of men on our hands whom we brought from Massachusetts and whose pay will have to continue while they stay in Porto Rico. On the other hand we have an agreement with these men whereby we can discharge them and pay their passage (equivalent to 2d class on the N. Y. & P. R. S. S. Line) from San Juan to Boston including their wages during transportation. We make you aware of our position in this matter as you are responsible for our expense due to delay caused to us by the suspension of work and so it is your option whether the men shall remain in San Juan on pay or whether they shall be sent to Boston and brought back at some future time in which case the transportation charges as above outlined would have to be paid both ways by you. Please let us have your orders in regard to this matter at your earliest convenience as that will save unnecessary expense to yourselves.

Yours truly,

GUERINI STONE CO.
G. A. FOLLETT, *Agent.*

Plaintiff's Exhibit 3.

San Juan, March 11th, 1912.

The Guerini Stone Co., 88 Broad St., Boston, Mass. c/o San Juan Office, Mr. G. A. Follett, Ag't.

DEAR SIR: We wish to acknowledge rec't of yours of the 9th inst., in which you speak of a conversation with our Mr. Oaksmith
385 and in which you refer to an order to suspend operations on the Bldg. which Mr. Berryman Sup't of Const. has delivered to us, and it is evident from your communication that you wish us to direct you what to do in the matter.

We would, in reply, respectfully refer you to your contract with us.

THE P. J. CARLIN CONST. CO.
D. P. O.

Plaintiff's Exhibit 4.

San Juan, March 27th, 1912.

The Guerini Stone Co., San Juan Office.

GENTLEMEN: During the time of the suspension of the work by order of the Government beginning March 10th, and until work is resumed, please let us have daily the items of expense to which you may be subject.

Yours very truly,

THE P. J. CARLIN CONSTRUCTION CO.

Plaintiff's Exhibit 5.

Feb. 13, 1911.

J. P. Carlin Construction Co., 16 E. 23d St., New York City, N. Y.

GENTLEMEN: In accordance with conversation with you last Friday, we enclose herewith copy of the record of the transfer of the contract for concrete from Annibale Guerini to the newly incorporated Guerini Stone Company.

The record is attached as a true record by the Clerk, Edwin P. Bliss.

Yours truly, H. P. CONVERSE & CO.

386 *Plaintiff's Exhibit* 6.

The P. J. Carlin Construction Co., Building Contractors.

No. 16 East 23d St., New York 2/20/11.

The Guerini Stone Company, 88 Broad Street, Boston, Mass.

GENTLEMEN: We herewith acknowledge receipt of yours of the 17th inst., also transfer of contract from the Guerini Stone Company as originally signed to the Guerini Stone Company recently incorporated, which will be satisfactory.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.
J. P. CARLIN.

Plaintiff's Exhibit 7.

Postal Telegraph—Commercial Cables.

Telegram.

7 Weir St. Taunton, Mass., Jan. 10-11.

Guerini Stone Co., Middleboro, Mass.:

Send bond for Porto Rico immediately work must start at once.

P. J. CARLIN CONSTN. CO.

387 *Plaintiff's Exhibit* 8.

The P. J. Carlin Construction Co.

San Juan, Porto Rico,

Sept. 27th, 1911.

The Guerini Stone Co., San Juan.

GENTLEMEN: In accordance with your contract with The P. J. Carlin Const. Co., on the P. O. & Court House at San Juan, Porto Rico, you are hereby notified to proceed with the walls on the approaches and areas on the exterior of the Building as fast as foundations for same are placed. You are aware, of course, that part of these foundations are already in.

Yours very truly,

D. P. OAKSMITH, *Supt.*

Plaintiff's Exhibit 9.

Oct. 21, 1911.

P. J. Carlin Const. Co., New York City, N. Y.

GENTLEMEN: Under date of Oct. 13th we are advised by our San Juan office that they have not been able to commence work up to that date on our concrete work as the job was not ready for it. They also state that they started to set granite in the southwest corner, but on account of some question as to measurements, were unable to proceed with the work. They then started to set granite on the southeast corner on the morning of Oct. 13th and found that there was some question for Mr. Stierle and Oaksmith to settle at this point.

You will note therefore that up to Oct. 13th they have been unable to proceed with our work, owing to the fact that it is not ready for us.

As we have a time contract with you, it is very important that
388 the building should be turned over to us in such quantities as to enable us to proceed with the work continuously and at such rate as will insure our completion within the terms of the contract.

Yours truly,

GUERINI STONE COMPANY.

Plaintiff's Exhibit 10.

Dec. 19, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: In accordance with the terms of contract, please send us your form blanks for application for payments.

Yours truly,

GUERINI STONE COMPANY.

Plaintiff's Exhibit 11.

The P. J. Carlin Construction Co., Building Contractors.

No. 16 East 23rd St.,
New York, Dec. 20, 1911.

Guerini Stone Company, #88 Broad Street, Boston, Mass.

GENTLEMEN: Replying to yours of the 19th instant, we are enclosing herewith 12 form blanks for application for payments. Please note that these are printed in copying ink, and will yield copy under press.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.
O. SIEGMANN.

389 *Plaintiff's Exhibit* 12.

New York, —— —, 190-.

To Messrs. P. J. Carlin Const. Co., 16 East 23rd Street, New York.

GENTLEMEN: I or we hereby make application for payment on account of — contract on — Job.

Amount of Original Contract	$.....
" " Extra	$.....
" " "	$.....
" " "	$.....
Total	$.....
Amount of work completed to date	$.....
Cash Received $.....	
Charges $.....	
Amount of % reserve $.....	
Total	$.....
Amount of this application	$.....

Very truly yours, —— ——

Applications for payment must be in this office not later than the 2nd of the month.

Plaintiff's Exhibit 13.

New York, Dec. 30, 1911.

To Messrs. P. J. Carlin Const. Co., 16 East 23rd Street, New York.

GENTLEMEN: We hereby make application for payment on account of concrete and granite setting contract on San Juan, P. R., Post Office Job.

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Amount of Original Contract		$64,500.00
" " Extra		$.....
" " "		$.....
" " "		$.....
Total		$.....
Amount of work completed to date		$5,488.00
Cash Received	$.....	
Charges	$.....	
Amount 15% Reserve	$823.20	
		823.20
Total		$4,664.
		989.20

In addition we set to date 2,473 Sq. Ft. of granite @ 40¢

Amount of this application $5,654.00

Very truly yours,

GUERINI STONE CO.
G. A. FOLLETT, *Agent.*

Applications for payment must be in this office not later than the 2nd of the month.

Plaintiff's Exhibit 14.

Schedule of Amounts Covering Each Branch of the Work in Construction Post Office and Court-house Building at San Juan, P. R.

1. Excavation and filling ..... $9,000.00 per cu. yd.
   Contract Unit $1.50 & 60¢ yd.

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2. Concrete footings & Walls to Basement level ..... $18,000.00 .50 & 55¢ per cu. ft.
3. Exterior and Interior concrete walls, arches & cement work ..... $48,000.00 1.07 per cu. ft.
4. Concrete Floors and castings. 37,500.00 45½ per sq. ft.

Plaintiff's Exhibit 15.

The P. J. Carlin Construction Co., Building Contractors,

No. 16 East 23rd Street.

New York, Jan. 29, 1912.

Guerini Stone Co., #88 Broad Street, Boston, Mass.

GENTLEMEN: We acknowledge receipt of yours of January 27th, regarding the San Juan, Porto Rico work.

Since Mr. Converse expects to be here some time this week, we shall take up the matter of payment with him when he comes. Please ask him to bring the necessary corporation authorization to receive same.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.
J. P. CARLIN, *Secretary.*

392 *Plaintiff's Exhibit* 16.

Guerini Stone Co.

Manufacturers of Silichite, the Ideal Building Stone, and the Guerini Silicoides White Stone, Granite & Marble Composite for Exterior & Interior Work.

88 Broad St.,

Boston, Mass., Jan. 30, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your favor of the 29th inst. is received. We note that you ask for the necessary corporation authorization to receive payments.

This is to authorize you to make all checks payable to the Guerini Stone Co. and you may hand same to our Mr. H. P. Converse, who is President and Treasurer, or you may mail same to our address at 88 Broad St., Boston, Mass.

Yours truly, GUERINI STONE COMPANY.
H. P. CONVERSE, *Pres.*

Mr. Converse will call at your office Thursday morning Feb. 1st and will be in N. Y. for the day only.

Plaintiff's Exhibit 17.

Feb. 6, 1912.

P. J. Carlin Const. Co., New York City, N. Y.

GENTLEMEN: In accordance with your instruction to Mr. Converse we have made our January Requisition in the units and unit price

used by the government engineer when he makes up monthly estimates according to your schedule of amounts.

393 You will note that our contract covers only two items of this schedule, to wit:

#3 Exterior and Interior Concrete Walls and Arches and Cement Work ..... $1.07 per cu. ft.
#4 Concrete Floors and Castings ..... 45½ per sq. ft.

All the concrete work completed to date comes under item 3 and is so included. We inclose formal requisition for $9,012.50 due us under contract.

Yours truly,

GUERINI STONE COMPANY.

Plaintiff's Exhibit 18.

New York, N. Y., March 9, 1912.

P. J. Carlin Const. Co.

GENTLEMEN: In reference to the San Juan job, we must call your attention to the fact that we are not being paid in accordance with the terms of the contract. After several months of endeavor to get payment, it was finally necessary for Mr. Converse to go to New York and at that time he received a check for $3765.50. This was the first payment we have received on account of the large expense we have been put to and it was received Feb. 2d. At that time you had been paid over $13,000.00 for the work we had done. This is manifestly unfair to us. We called for further payment of $9,000.00 and to this date we have received no reply.

When our Mr. Converse was at your office Feb. 2d. you gave us a memorandum of prices for work done on this job, stating that they would be the basis on which we would be paid and to make our application to you on that basis. We have complied with this and yet have not received check. Your delays, both as to payment and progress of the work, are affecting us seriously. More than a year ago you telegraphed, "Work must be begun at once."

394 We immediately went to New York and conferred with you and you notified us that we must get our men and equipment on the job at once, which we did.

The labor and materials not included in our contract have been provided in such manner as to cause delay in the material progress of our work and loss to us. Matters have reached such a stage that we insist on payment of $9,000.00 which should have been paid us long ago and in addition to this, payment for work done during February.

As suggested by you over the telephone today, we sent you figures regarding amounts of work completed. These were given to your Mr. John Carlin the latter part of February, in San Juan.

If these matters cannot be satisfactorily adjusted between us, it will be necessary for us to take it up with Washington. We cannot understand the non-payment to us, when you are collecting on

account of work done by us. It seems to us you cannot have realized the loss and delay you have put upon us and believe that upon careful consideration of the whole matter, you will recognize the fairness of our claims.

Kindly let us hear from you at once, yours truly,

GUERINI STONE COMPANY.

New York, March 9, 1912.

To Messrs. P. J. Carlin Const. Co., 16 East 23d St., New York, N. Y.

GENTLEMEN: We hereby make application for payment on account of Guerini Stone Co. Contract on San Juan Post Office Job:

Amount of Original Contract		$64,750.00
Extra work to your order:		
Reconstructed Piers		300.00
395		
Granite Setting:		
3460 sq. ft. @ 40¢ per sq. ft. surface.		
Amount of work completed to date		18,237.00
Cash received	3,765.50	
Amount 15% reserve	2,737.55	
Total		6,501.05
Amount of this application		11,735.95

Date of Contract, Dec. 16, 1910.

Very truly yours,

GUERINI STONE COMPANY.

Plaintiff's Exhibit 19.

March 9, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: In addition to the concrete laid on reconstruction work by your San Juan Office, the following work was done during the month of February at San Juan P. O. Blg. up to and including February 27th:

Concrete	105 cu. yds.
Stone set	860 sq. ft.
Total number of cu. yds. laid	578
" Stone set	3460 sq. ft.

We enclose herewith formal application.

Yours truly,

GUERINI STONE COMPANY.

Plaintiff's Exhibit 20.

Feb. 24, 1912.

P. J. Carlin Construction Co., New York City, N. Y.

GENTLEMEN: We hereby request immediate payment of Nine Thousand Dollars on account of Contract for Concrete Work at San Juan Post Office Building at San Juan, Porto Rico.

Very truly yours,

GUERINI STONE COMPANY.

396 *Plaintiff's Exhibit* 21.

Postal Telegraph—Commercial Cables.

Telegram.

Boston, Mass., March 13, 1912.

P. J. Carlin Const. Co., 16 East 23rd St., New York, N. Y.

When send check account work San Juan.

GUERINI STONE CO.

Plaintiff's Exhibit 22.

Postal Telegraph—Commercial Cables.

Telegram.

Br. New York, Mar 13-'12.

Guerini Stone Co., 11 Broad St., Boston, Ms.:

Necessary for Converse to come here Friday morning.

P. J. CARLIN CONSTN. CO.

397 *Plaintiff's Exhibit* 23.

Guerini Stone Co.

Manufacturers of the Ideal Building Stone, Guerini Silicoides White Stone, Granite and Marble Composite for Interior and Exterior Work.

San Juan P. R. Received Mar. 30, 1912. P. J. Carlin Const. Co., per —— ——, 88 Broad St., Boston, Mass.

San Juan, P. R., March 29, 1912.

P. J. Carlin Const. Co., San Juan, P. R.

GENTLEMEN: In regard to the situation at the new Post Office and Court House Building at San Juan, P. R. with respect to our

contract with you on same, and, in connection therewith our conversation we find ourselves in the following position. Owing to the indefinite length of time that will be necessary to put the foundations in the condition demanded by the Government and variously estimated at from four weeks to five months and owing to a vagueness in our minds as to who is responsible for our money loss caused by this stopping of our work, we find that it is important for us to guard against any unnecessary expense on our part. In view of this we have decided to return our men brought here from the states for this work, to Boston until such time as the foundations are completed, the first floor structural steel is in place and the building as a whole is ready for us to continue our work with a reasonable assurance that our work can be pushed without the continued series of delays that we have so far to undergo. We have immediate use
398 for these men in the states and they will be brought back here as soon as the above conditions have been fulfilled.

We have fourteen men on our payroll who came here from the states and who have been idle for three weeks because of this stop in the work. They are becoming discontented and although they are receiving full time pay they are getting restless and want to return to the states. This is much more important here than it would be in the states as there are no competent carpenters, moulders or concrete men for our class of work among the natives. However, if you can arrange with them to work for you until such time as we can profitably put them on our own work we are willing that you should do so with the understanding that you will release them to us at that time and pay us 20% of their payroll in order to cover us for house rent, light, ice, etc., which we are supplying to them without charge to them. Please let us hear from you in regard to this as soon as possible as we are planning to have them leave on the boat for New York sailing April 3d.

About your request that we should rent you our concrete mixer we will do so for the sum of eight dollars and fifty cents ($8.50) for each week day except holidays from the time you take it until it is returned to us in as good condition as when you take it. This price to include the use of our half yard mixer, electric double drum hoist, concrete elevator with steel bucket and wire fall, cement storage shed, track and car for taking stone to the mixer and electric wiring and water connection, electric current for operating the mixer and hoist. We do not include the labor or any repair work after you take the outfit.

Yours truly,

GUERINI STONE CO.,
By G. A. FOLLETT.

399 *Plaintiff's Exhibit* 24.

April 25, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: On March 9th we wrote you a long letter regarding our contract with you on the San Juan Post Office Building. Up to

this writing we have received no reply from you. We have not been paid in accordance with the terms of the contract and although we have endeavored to establish some definite methods to have the payments come to us regularly and on some basis mutually satisfactory, you have each time changed your basis of calculations. The last check you gave us was on a basis of what you thought the work ought to cost, which of course is of no force under the contract.

You stated that Mr. Carlin was in San Juan at the time and when he got back the matter would be gone into. We have received no work since he returned several weeks ago.

We have been put to a very large extra expense on account of your delays and believe that there is no question that the damages we have sustained are so serious as to justify us in terminating our contract. We must insist upon the cost of these delays being arbitrated at once in accordance with the terms of the contract and we can only proceed with the contract on the basis that the damages be now adjusted, so that we can proceed with our work on a new and fresh start.

We must be relieved from all responsibility as to our work cracking, as we understand that it does not rest upon foundations as originally called for at the time our contract was made.

We are ready and willing to meet you as far as possible, but are unwilling to bear expenses which are caused by your inability to let us proceed with the work in a reasonable and consecutive manner as required by the contract.

Please note that correspondence should be mailed to this office, except such small matters as directly concern the work in the field.

400 We understand that you asked our men in the field something about expenses for delays, but it is very indefinite as to what you refer to and our men in the field are not the ones to be applied to in such matters. Your New York office should write this office regarding any important matters regarding this contract.

Yours truly,

GUERINI STONE COMPANY.

To this Exhibit is attached a receipt for Registered Mail #41979 Boston Mass. May 22, 1912.

And Registry Return Receipt from P. J. Carlin Const. Co. May 29, 1912.

Plaintiff's Exhibit 25.

May 22, 1912.

P. J. Carlin Construction Co., New York, N. Y.

GENTLEMEN: In January and February of 1911, after consultation with you in your office in New York, you insisted on our starting work on the San Juan Job and stated that the granite base would be up and ready for our work by June 1st, we then sent men, tools and equipment to the job, as required by you and since that time have been at all times prepared to execute our contract with you.

We proceeded with making of moulds and throughout the balance

of the year 1911 we were delayed in proceeding with the completion of our contract by the non-arrival of the granite. This was not finally delivered in such quantities as to allow us to proceed with the concrete work, which rests directly on the granite, until February of 1912, and even at that time, there were some important omissions.

About the first week of March, 1912, we were again required to stop work, owing to changes to be made in the foundations of the building and we understand that it would be impossible for us to again
401 begin work for at least four to six months. We continually called your attention to the interruption in our work caused by these delays and the very considerable cost and damage to us caused by your breach of contract. Furthermore, during the whole of this time we have been unable to get payments from you in accordance with the terms of the contract. During our last conversation with you at your office, May 11th, we urged that this matter of damages be arbitrated, but you refused to agree to this, and you could give us no assurance that even now we would have an opportunity within any reasonable time to proceed with our work.

Under these circumstances and owing to your entire failure to comply with the terms of the contract, we hereby notify you that we now terminate the contract and shall proceed no further with the work, and that we shall hold you liable for the damages we have sustained by reason of your breach of contract, including your failure to provide labor and materials not included in the contract with us in such manner as not to delay the material progress of our work and your failure to make payments in accordance with the terms of the contract, and all other breaches of contract on your part.

Yours truly,

GUERINI STONE COMPANY.

Plaintiff's Exhibit 26.

The P. J. Carlin Construction Co., Building Contractors, No. 16 East 23d St.

New York, Sept. 15/11.

The Guerini Stone Company, San Juan, P. R.

GENTLEMEN: In reply to your communication, regarding an order to proceed with the work at Porto Rico, we would say that we understand you have already proceeded, having been on the ground for some months; however, to make it explicit, please proceed at once to go forward with all the work you have under contract, and particularly with the concrete walls and granite work up to and in-
402 cluding the finish of the first floor.

Mr. Sullivan reports that the front of the building and portions of the two returns are ready for the granite setting, and the rear of the building and the remainder of the returns, was ready before we left, for the concreting up to the point at which the granite commences.

We trust that there has been no delay on your part in expediting that portion of the work, and await confirmation from San Juan.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.
J. P. CARLIN, *Secretary.*

Plaintiff's Exhibit 27.

Jan. 27, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your favor of the 14th inst. is received. We note that you are still waiting for monthly estimate of quantities formed by us under sub-contract for San Juan, P. R. Have you instructed your representative to send you quantities? Our Mr. Lootz agreed with him as to work done up to Dec. 30th. There are about 3500 cubic yards of concrete in our job and this will give an average price of $18.50 per cubic yard for the concrete in place.

We have already put over $20,000 into this job, due very largely to your delay in getting work and materials ready for us. Up to the present date we have not received a cent of money from you and if you think it is a hardship for you to have $35,000.00 worth of material on the job, as we understood you to say to our Mr. Converse, we wonder what you would think if you were sub-contractor and had to spend over $20,000 without any payments on account.

We must insist on being given fair consideration in the handling and progress of this job. In this connection, we would call
403 to your mind the situation regarding the stone work which we have been setting and which must be set before we can do our exterior concrete work.

By noon of Jan. 15, 1912, the stone was delivered from Steamer "Luckenback" which was supposed to finish up and include the J course around the main building. No approach stones or sills.

During three weeks preceding this date, the stone on the job could not be set continuously. This necessitated moving the men to a different part of the wall almost after setting each stone and greatly added to the expenses of setting. Notwithstanding this fact, the work has continued and all stone which could be set, was set before the arrival of the "Luckenback."

Our Mr. Lootz has got things working smoothly and anything that your local representative desires to bring to our attention, please have him notify our Mr. Follett.

Our Mr. Converse will be going down in the course of a few weeks and if there is any special messages which you wish taken down or any special part of the work which you wish taken up, please notify us, so that Mr. Converse can look after it. It is quite possible Mr. Converse may be in New York next Wednesday, or sometime next week and he will call upon you.

Yours truly,

GUERINI STONE COMPANY.

Plaintiff's Exhibits 28 *and* 29.

Photographs, Oct. 2, 1911, showing site of building &c. S. M. pp. 413-414; infra, p. 259.

Plaintiff's Exhibit 30.

Dec. 13, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Our inquiry of Dec. 8th was prompted by a desire to be assured that the contemplated increase in our organization would not be hindered by the lack of any individual stones. Your letter of Dec. 12th not only intimates that a very large proportion of the stone has not yet left this country, but that some one hundred pieces are not yet cut.

We have now at a very unreasonable amount of expense flitted about from place to place within reach of the derricks you have provided and set various isolated piers up to the level of the skew backs of the arches so that now instead of holding up the work as a casual reading of your letter would suggest, we are awaiting arrival of material which you think will be there Jan. 1, 1912. There is not a considerable quantity of stone on the job which can be set.

We hope you will ascertain just what stones are lacking and if it is in any way essential to the progress of the general contract that they be placed, that measures be at once taken to hurry them forward. We would like a copy of such list so we may know what to expect.

Yours truly,

GUERINI STONE COMPANY.

Plaintiff's Exhibit 31.

Dec. 18, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your letter of the 14th inst. is received. Regarding granite, it is all set, except such scattering pieces as would be in some cases, impossible to set owing to lack of other pieces of granite or in the case of a few pieces only one stone could be set here and another there, scattered all over the building.

405 We have a copy of photograph taken previous to Dec. 1st showing granite set and the 500 cubic feet you mention as set in no way approximates what this photograph shows to be set.

We are being delayed by the non-delivery of the granite and anything you can do to hasten delivery will save considerable expense to us.

We have not been able to proceed with the main portion of our concrete work, owing to your delay in preparing your work for us.

We have sent our Mr. Lootz to take charge of the San Juan job and hope your Mr. J. J. Carlin will find him an agreeable co-worker.

Mr. Lootz graduated from the Mass. Inst. of Tech. in 1898 and has been engaged on outside construction ever since.

Yours truly, GUERINI STONE COMPANY.

Plaintiff's Exhibit 32.

The P. J. Carlin Construction Co., Building Contractors.

No. 16 East 23d St.

New York, Aug. 5/11.

The Guerini Stone Company, San Juan, P. R.

GENTLEMEN: We have yours of July 28th, asking how negotiations are progressing with regard to the additional work at San Juan. We had expected a communication from you, quoting us on the various items about which we wrote you. We have not heard from your Boston Office, in fact we understood you would furnish us all the necessary information and quote us the prices asked for. Please do this without delay, as otherwise we will be obliged to do the work ourselves.

We have instructed Mr. Sullivan to have you set the granite at your bid price, and a shipment of granite has already gone forward.

406 In the matter of the jointing, we note that you have sent several samples to Washington, and that Mr. Stierle has written to Mr. Taylor substantiating your statement with respect to the jointing, and if we hear direct, we will transmit the answer to you.

We understand that Mr. Converse has gone to Washington to take the matter up directly with Mr. Taylor, and if he gets an answer before you, he will doubtless communicate with you.

With respect to the samples to which you refer, have you sent these direct to Washington? One or two samples you sent here were broken in transit, and could not, therefore, be submitted to Washington unless, therefore, you have sent them direct, please do so without delay, and have them properly boxed so that they will not be broken, and label it as follows:

U. S. Post Office and Court House, San Juan, P. R. Samples of Cast Stone,

Submitted by the P. J. Carlin Construction Company.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.
J. P. CARLIN, *Secretary.*

Defendant's Exhibit A.

[7 for Identification.]

Feb. 28/11.

The Guerini Stone Company, 88 Broad Street, Boston, Mass.

GENTLEMEN: We are in receipt of the following letter from the Supervising Architect, with reference to the U. S. Post Office & Court House at San Juan, P. R.—

GENTLEMEN: This office acknowledges the receipt of your letter of the 16th instant, forwarding shop drawings showing jointing,
407 etc., for the exterior walls of the Post Office Building at San Juan, Porto Rico, for which you have the contract.

You will note from the contract drawings that the exterior surfaces and walls above the first floor line show generally without surface joints; and it was the intention to have the work carried out accordingly; limiting the jointed work to these portions which are to be cast separately such as work about certain doors and windows, etc., as indictated on the contract drawings. This jointing will be shown more in details to be furnished shortly by this office. It may also be stated that, even if consideration were given to the arrangements shown by your shop drawings, the courses are so irregular in heights and general arrangement that it would be entirely unsatisfactory.

The drawings are returned this day under separate cover.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.
J. P. CARLIN.

Drawings returned under separate cover.

Defendant's Exhibit B.

Guerini Stone Co.

Manufacturers of Silichite, the Ideal Building Stone, and the Guerini Silicoides White Stone; Granite and Marble Composite for Exterior and Interior Work.

88 Broad St.,

Boston, Mass., Feb. 8, 1911.

Messrs. J. P. Carlin Construction Co., 16 East 23d Street, New York City, N. Y.

GENTLEMEN: Our Mr. Guerini will sail for Porto Rico Saturday, February 11th. He will call at your office Friday morning.

Mr. H. P. Converse will be there 6 o'clock in afternoon.
408 He wishes to meet Mr. Carlin. Please wait for him at your office at 6 p. m.

Respectfully yours,

GUERINI STONE CO.
A. GUERINI, *V.-P.*

Defendant's Exhibit C.

Feb. 10/11.

Mr. F. T. Carlin, San Juan, Porto Rico.

MY DEAR FRED: This will serve to introduce Mr. Guerini of the Guerini Stone Company, who has the contract for the concrete interior and exterior from the basement floor up. Please assist him in every way you can; give him the benefit of all your *pieces* on sand,

stone, cement and labor, and give him such room around about the buliding for the casting of the stone work as you can afford. I will forward you a copy of his contract, under separate cover, so that you will understand just what he is to do.

Sorry we did not hear by wire what chance there was to substitute piling. It leaves us in the air here as to ordering the material. None of the other points have as yet been settled, and as soon as they are, we will let you know. We sincerely trust that the same question is satisfactorily adjusted, and that you are hauling sand to the site.

Lovingly,

JOE.

Defendant's Exhibit D.

Jan. 30, 1911.

P. J. Carlin Construction Co., 16 East 23d St., New York.

GENTLEMEN: Please address your correspondence to us *as* 88 Broad Street, Room 818, Boston, Mass.

Our Mr. Converse will wish to see you in the near future
409 and in order that he may not again make a trip to New York without seeing you, would request that you advise us some date of seeing you after it has been decided regarding the Artificial granite.

Yours truly,

GUERINI STONE CO.
H. P. CONVERSE, *Pres.*

Abstract Defendant's Exhibit E.

Specification for the Construction, Complete (Except Elevators), of the United States Post-office and Court-house at San Juan, P. R.

Treasury Department,

Office of the Supervising Architect.

General Conditions.

Form of proposal and signature.—Proposal must be made on the blank form hereto attached, inclosed in sealed envelope, marked proposal with title of building as given above, and addressed to the Supervising Architect, stating in writing and figures (without interlineation, alteration, or erasure) the sum of money for which the bidder proposes to supply the materials and perform the work required by the drawings and this specification, and the time within which he proposes to complete the work, and the unit prices called for in proposal sheet. The proposal must be signed with the full name and address of the bidder; if a copartnership, the copartnership name by a member of the firm, with the names and addresses in full of each member and if a corporation, by an officer in the corporate name, with the corporate seal attached to such signature.

No telegraphic proposals or telegraphic modifications of proposals will be considered. Proposals received after the time adver-
410 tised for the opening will be returned unopened. If proposal is sent by registered mail, allowance should be made for the additional time required for such transmission.

* * * * * * *

Subcontractors.—No subcontractor or other person furnishing material or labor to the contractor will be recognized nor will this Department be responsible in any way for the claims of such person beyond taking a bond, as required by the act of Congress approved August 13, 1894, which provides in substance that when a formal contract is let for the erection or repair of a public building, etc., the contractor, before commencing such work, shall furnish the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor will make prompt payment to all persons furnishing him labor or materials used in the prosecution of the work. Persons so furnishing materials or labor have a right of action on said bond, in the name of the United States, for their use. No formal contract is usually let, however, and no bond taken where the amount involved is less than $2,000.

Parties in interest.—No member of or Delegate to Congress and no officer of the Treasury Department, superintendent, inspector, clerk, employee, or other person in any manner connected with the office of the Supervising Architect, shall be interested, either directly or indirectly, in the contract or work herein provided for, or be entitled to any benefit derived therefrom; and any violation of this understanding shall work a forfeiture of all moneys which may become due to the successful bidder.

Rights reserved.—The material proposed to be used, time for completion of work, and the competency and responsibility of bidders will receive consideration before award of contract.

The Treasury Department reserves the right to accept any part or parts of the proposal made at the prices included in same; also to waive any informalities in, and to reject any and all proposals, and to require the contractor to discontinue the services of
411 any workman employed on the work who is unskillful or otherwise objectionable.

Form of contract.—The contract which the bidder agrees to enter into shall be in the from adopted and in use in the office of the Supervising Architect; blank forms of which can be inspected at said office, and will be furnished, upon request being made, to parties proposing to submit bids. In case of the abrogation of the contract, whether by reason of the default of the contractor, his bankruptcy, or other cause, the Supervising Architect, acting for both parties, shall have the right to determine the valuation of all work performed, and all materials furnished in place in connection with the contract, and of all material, machinery, tools, etc., upon the site of the building taken possession of by the Government, and his decision shall be final.

Protection of work and materials.—The contractor must obtain, at his expense, all necessary policies of insurance on work and material supplied by him, as the same will be at his risk until final completion, inspection, and acceptance; but the contractor will be relieved of any risk for that portion of the building occupied by the Governor before entire completion of his contract.

Modifications.—The Department reserves the right to make any additions to, omissions from, or changes in, or substitutions for, the work or material called for by the drawings and specification, without notice to the surety or sureties on the bond given to secure satisfactory compliance with the terms of the contract; and the Department further reserves the right to demand additional security when additions are made, if in its judgment, such security is required. The unit prices called for in the proposal sheet shall be used as the basis of value of such additions, omissions, or changes if they are deemed reasonable by the Supervising Architect. If deemed unreasonable, or if none applicable are given, and no agreement can be reached by the Supervising Architect and the contractor as to the reasonable value of the work, then the Super-
412 vising Architect shall have the right to fix the value of such additions, omissions, or changes, and no claim for damages on account of such change or for anticipated profits shall be allowed.

Payments.—Payments will be made as hereinafter stated.

Delays.—Each bidder must submit his proposal with the distinct understanding that, in case of its acceptance, time for the completion of the work shall be considered as of the essence of the contract, and that for the cost of all extra inspection, and for all amounts paid for rents, salaries of contingent force, and other expenses entailed upon the Government by delay in completing the contract, the United States shall be entitled to the fixed sum of fifty dollars ($50) as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States. Provided, however, that the collection of said sum may, in the discretion of the Secretary, be waived in whole or in part; and that the contractor is to be entitled to one day, in addition to said stipulated time, for each day's delay that may be caused by the Government.

The Department, acting for the United States, reserves the right to suspend any portion of the work embraced in the contract whenever, in its opinion, it would be inexpedient to carry on said work.

* * * * * * *

Notice to Sureties.

The attention of the sureties is particularly directed to the following conditions: The final inspection and acceptance of the work shown by the drawings and specifications forming a part of the contract shall not be binding or conclusive upon the United States if it shall subsequently appear that the contractor has willfully or fraudulently or through collusion with the representative of this Department in charge of the work supplied inferior materials or

workmanship, or has departed from the terms of his contract. In any such case the United States shall have the right notwithstanding such final acceptance and payment, to cause the work to be properly performed and satisfactory material supplied to such extent as in the opinion of the Supervising Architect may be necessary to finish the work in accordance with the drawings and specifications therefor at the cost and expense of the contractor and the sureties on his bond and shall have the right to recover against the contractor and his sureties the cost of such work, together with such other damages as the United States may suffer because of the default of the contractor in the premises, the same as though such acceptance and final payment had not been made.

413

Attention is called to section 21 of the act approved June 6, 1902, which provides as follows:

That in all contracts entered into with the United States, after the date of the approval of this Act, for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is hereby authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits hereafter commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties.

Guarantee.—This specification requires that certain work be guaranteed and maintained in good condition for a specified time after its final acceptance and the payment therefor, and the bond which will be required in connection with the contract must also cover such guarantee.

Proposals.—Proposals as hereinbefore called for must be based upon drawings Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, W-36, W-37, W-38, W-39, W-40, miscellaneous drawings Nos. M-48, M-55, and this specification.

414

Extent and charter of work.—This contract includes the construction of the building complete, including the installation of the plumbing, gas piping, electric conduits and wiring. The elevators and the interior lighting fixtures are not included.

The letter boxes, letter, paper, and package drops, etc., will be furnished by the Government, but the contractor will be required to set them in place, as hereinafter specified.

The contractor must carefully fit his work to any work which may be provided by another contractor in advance of that contemplated by this specification, and he shall not proceed with any portion of the work in connection therewith until such other work is properly in place and he is directed to do so.

Bidders should visit the site and fully inform themselves of the

character of the same, and the conditions under which the work is to be performed and failure to do so will not relieve the successful bidder from the necessity of supplying, without additional cost to the Government, any materials or labor that may be required to complete the work in accordance with the true intent and meaning of the drawings and specification.

Payments.—Payments of 90 per cent of the value of the work executed and satisfactorily in place, as ascertained by the Supervising Architect, acting through the superintendent, will be made monthly; and payment of the 10 per cent retained will be made after final acceptance, by the duly authorized representative of the Treasury Department, of all materials and workmanship embraced in the contract. But payment will not be made until every part of the work to the point for which payment is claimed is satisfactorily supplied and executed in every particular and all defects therein remedied to the satisfaction of the Supervising Architect.

The Government reserves the right to withhold any payment until satisfactory engineer's certificates, samples, and shop drawings, hereinafter mentioned, are supplied in accordance with the specification requirements.

415 Time to complete.—The work must be carried on with sufficient workmen and materials to the satisfaction of the Supervising Architect to insure its completion on or before the 1st day of July, 1910.

Foreman.—A satisfactory foreman or superintendent shall be kept on the ground at all times during the progress of the work to receive instructions and with authority to act for the contractor.

Models.—It is the purpose of the Government to supply models for certain ornamental work, but the right is reserved to require the work to be executed from full size drawings, at the discretion of the Supervising Architect.

Explanation of drawings.—The general character of the detail work is shown on the scale drawings, but minor modifications may be made in the full-size drawings or models, and the contractor must not get out any part of the work requiring details or models until he has received the same.

This specification is intended to supplement the drawings, and, therefore, it will not be the province of this specification to mention any portion of the construction which the drawings are competent to explain, and such omission is not to relieve the contractor from carrying out such portion only indicated on the drawings, and should items be required by the specification not indicated on the drawings, they are to be supplied even if of such character that they could have been indicated thereon. Any items which may not be indicated on the drawings nor mentioned herein but are necessary to complete the entire work, must be supplied in place.

The decision of the Suprevising Architect as to the proper interpretation of the drawings and specification shall be final.

Workmanship and materials.—All work must be executed in strict accordance with the drawings, such other details or models as may be furnished, this specification, and the instructions of the

superintendent. All materials and workmanship shall be of the best quality.

Material or work that has been rejected must be promptly
416 removed, and should the same not be done the superintendent may, forty-eight hours after serving written notice on the contractor, have the same removed, and the expense incurred will be deducted from any money due the contractor.

Protection.—The contractor must protect all materials and work, whether incorporated in the building or not, and shall furnished heat to prevent injury from dampness or cold.

The contractor shall also provide and maintain all necessary guards, lights, etc., for the protection of the public and comply with all municipal ordinances which apply to the use of sidewalks and streets for building operations, but such ordinances do not govern inside of lot lines.

Temporary toilet accommodations.—The contractor must provide for the use of all his workmen, where directed, ample temporary sanitary toilet accommodations and keep such clean and free from flies, and prior to the completion of the contract all connections and appliances connected therewith are to be removed and the premises left perfectly clean.

Debris.—When directed and at the completion of the work, the contractor must remove all dirt and rubbish from the building, site, and adjacent streets.

Surveys and test levels.—The contractor must employ a competent engineer to lay out the lines of the building, establish the elevations at tops of footings and piles, the different floor levels, the top of main walls, and the lines and elevations of the approaches, and forward to this office, through the superintendent, certificates of said engineer that finished levels are as required by the drawings.

Photographs.—The contractor must furnish to the Supervising Architect photographs as follows: On the first of each month two photographs 6½ by 8½ inches mounted on muslin and each month during the erection of the steel work two additional photographs, all from points selected by the superintendent, and when the building and approaches are completed, unmounted photographs 8 by 10 inches, in duplicate, from two points of view, one showing
417 the entire front and one side elevation and the other the entire rear and remaining side. The photograph of the finished work shall be from such points as will give the best general view of the building and must include as much of the approach work as is consistent therewith.

Shop drawings.—Shop drawings, course and setting plans, as hereinafter specified, must be furnished to and be approved by the Supervising Architect before any of the work for which such drawings are required is commenced, and all work furnished must be in strict accordance with such approved drawings. The approval of such drawings shall be general, and does not mean said drawings have been checked, and shall in no way relieve the contractor from the responsibility of proper fitting and construction of the work, nor from the necessity of furnishing material or workmanship required

by the drawings and specification which may not be indicated on shop drawings when approved. Each shipment of drawings must be accompanied by a letter of transmission giving a list of the numbers of the drawings. Each drawing must be marked with the name of the building, each series to be numbered consecutively, and all drawings must be checked and be complete before being forwarded to this office.

Samples.

The contractor must forward to the Supervising Architect, for approval, samples of all materials required, with charges prepaid.

Materials for which samples are required shall not be delivered until samples of the same have been approved, and the materials delivered must correspond in every respect with approved samples.

The following samples must be submitted within six (6) weeks from the date of the award of the contract:

Portland cement, five pounds in tight cans; Sand and Aggregate one quart each; Stone, 6-inch cubes each kind, showing finish
418 specified; Brick, each kind; Metal fabric for reinforcing concrete, pieces about 6 inches.

The following samples must be submitted within six (6) months from the date of the award of the contract:

Marble, the several kinds, 6 by 6 inches; Terrazzo, pieces 6 by 6 inches. * * *

The contractor shall submit any other samples during the progress of the work that may be required by the Supervising Architect.

To insure prompt consideration of samples, a letter signed by the contractor must be mailed to the Supervising Architect on the date of each shipment, containing the following information:

A list showing every sample forwarded. * * *

Each sample must have a label showing the material represented by the sample, the name of the contractor, and the building for which it is intended.

Time is required for testing and inspecting samples of materials, and in no case will the time for completion of the contract be extended on account of failure of contractor to submit samples as above specified.

Attention is particularly called to the rights reserved, as hereinbefore specified, to withhold payment if samples and shop drawings are not promptly submitted as required.

* * * * * * *

NOTE.—Particular attention is called to the fact that the approval of samples is generally for quality, color, and finish, and in no case modifies the requirements of the drawings and specification as to dimensions or design.

Excavation.

The finished lines of excavations are to conform as nearly as possible to the lines of the masonry.

Any excavation made to a greater depth than that required must be filled with concrete, as under no circumstances shall such space be back filled with earth.

Where plank forms are used for concrete footings, the ex-
419 cavation shall be large enough to receive the same; otherwise the trenches shall be cut to the exact size of the footings.

All forms shall be removed before back filling is done. All back filling shall be done with clean earth;; and all back filling shall be thoroughly tamped in place or puddled.

Any back filling done before it is ordered or any earth which caves against foundations must be removed.

If any old excavations within 5 feet of footings extend below same, directions for filling must be obtained from the Supervising Architect before proceeding with the work.

Any piping encountered shall be removed to a point 1 foot outside foundations and capped or plugged tight, unless otherwise specified under "Plumbing" or directed.

Cement.

All Portland cement shall have a specific gravity of not less than 3.10. It shall contain not more than 1.75 per cent anhydrous sulphuric acid (SO_3) nor more than 3 per cent magnesia (MgO).

The standard of fineness shall be that 92 per cent by weight shall pass a 100-mesh sieve, and 75 per cent shall pass a 200-mesh sieve. If the material does not meet the requirements as to fineness, it will be either rejected or the contractor will be required to use 2 per cent additional for each 1 per cent drop below the 92 per cent limit, or 3 per cent additional for each 1 per cent drop below the 75 per cent limit.

It shall develop initial set in not less than thirty minutes and a hard set in not less than one or more than ten hours. Pats of neat cement about 3 inches in diameter, ½ inch thick at center, and tapering to a thin edge, shall be kept in moist air for a period of twenty-four hours. Should these pats not remain firm and hard, or should they show signs of distortion, blotches, discolorations, checking, cracking, or disintegration after being exposed to the air at normal temperature for seven days, or after being kept in water at 70° F. for seven days, or after exposure to a steam bath in a closed vessel for five hours, the material will be rejected.

420 All cement shall be uniform, be delivered in unbroken packages bearing the brand and maker's name, and must be kept free from moisture.

Mortar and Concrete.

NOTE.—Mortar and concrete shall be prepared only in such quantities as can be used at once, as retempered concrete or mortar must not be used.

Sand and aggregate.—Sand shall be sharp, coarse, and clean. Stone or gravel aggregate shall be hard and clinkers shall be thoroughly vitrified, and all aggregate shall be free from dirt, ash, coal, or other deleterious matter.

Aggregate for piles, footings, and walls shall be not greater than 2 inches and for all other purposes not greater than ¾ inch.

Mortar.—All mortar, not otherwise indicated, shall be composed of one volume of Portland cement and three volumes of sand.

The cement and sand shall be mixed dry until the cement is so thoroughly distributed that no particles of sand can be detected and except as otherwise required where metal reinforcement is used, only enough water added to bring it to a plastic condition after being thoroughly worked.

Cement and sand shall not be mixed more than one hour before the water is added, and mortar remaining unused at the time initial set occurs shall not be used in the work.

Concrete.—All cement in connection with concrete shall be Portland.

The cement and sand shall be made into mortar as above specified, the aggregate drenched, drained, and then mixed with mortar until each piece is thoroughly coated and immediately put in place in continuous layers; or a mixing machine of a type approved by the Supervising Architect may be used.

Concrete for piles, foundations, and walls shall be "dry," and shall be tamped until the water appears on the surface.

421 Concrete with reinforcing metal shall not be sloppy, but of such consistency that it will readily support the aggregate and cause it to cling together.

Owing to the uncertainty of plaster or mortar permanently adhering to concrete when applied after the cement in the concrete has set, all surfaces of concrete which are to receive plaster or mortar shall be of such character as will form a good bond or key for the mortar, the method of treating the surface to be approved by the Supervising Architect.

Concrete must be protected from the sun and kept wet for at least forty-eight hours.

Piles and footings.—All concrete for piles shall be composed of one volume of cement, three of sand, and six of stone or gravel aggregate.

All piles except test piles shall be of concrete, of composition as above specified. The piles shall be of continuous construction, be perpendicular, and in no case shall the depth be less than that indicated by the nearest test pile. Bidders will estimate on piling 30 feet long and give on the proposal sheet a unit price per linear foot, to be deducted for piles less than 30 feet, to *to* be added for piles over 30 feet long.

If a form of pile is used which requires driving they must have approved cast-iron or concrete shoes. If they are built in place with movable forms each layer of concrete shall be the full height of each successive raising of the form.

If the reinforced type of pile is used, drawings in triplicate, fully

illustrating the method of construction and showing the character and disposition of the reinforcement, must be submitted for approval, as hereinbefore specified.

Should piles become diverted from their proper position during driving, or should obstruction prevent driving to the proper depth the pile must be cut off and left and another pile driven as closely as possible; or the pile must be withdrawn and the space filled with gravel or broken stone well tamped in place.

Before commencing the placing of permanent piles five test piles must be driven at points to be selected by the superintendent.

422 The test piles shall be of wood of the exact diameter required for concrete, and they shall have all bark removed. The test piles shall be driven to such depth, that the safe load, figured by the following formula, shall be not less than 25 tons.

For steam hammer—

$$P = \frac{2\,W\,h}{S + 0.1}$$

For drop hammer—

$$P = \frac{2\,W\,h}{S + 1.0}$$

P=safe load in pounds.
W=weight of hammer in pounds.
h=fall of hammer in feet.
S=average penetration in inches per blow under the last five blows. (The heads of piles must not be boomed.)

If a drop hammer is used the hammer must not weigh less than 3,000 nor more than 4,000 pounds, and the height of fall shall not exceed 20 feet.

The test piles shall be tested by a load of 40 tons, to be applied not less than three days after driving the piles.

If any test pile, after being loaded for forty-eight hours, shows a settlement of more than ½ inch, further instructions must be obtained from the Supervising Architect before proceeding with the work.

Piles shall not be driven until excavation at that point has been completed.

Walls.—Concrete for walls shall be composed of one volume of cement, two of sand, and four of stone or gravel aggregate. The facing shall be as hereinafter specified. Lay concrete in continuous layers not over 3 feet in height, except in connection with concrete blocks or stone, where the concrete shall be carried the height of each course, and in connection with brick facing, where the concrete shall be laid flush with the top course of brick under each header course. All walls shall be plumb, straight, and out of wind. All concrete wall 6 inches thick shall be reinforced with metal.

In all walls 12 inches thick and over, wood blocks about 4 inches square by 12 inches long shall be built in flush with the

423 top of the concrete about 4 feet apart but not less than two blocks to a pier, the blocks to be removed before laying the next course of concrete.

Immediately before commencing to lay each course of the concrete the surface of concrete which has set shall be swept clean, thoroughly drenched, and brushed with neat cement grout.

At all angles of walls of the building and at all intersections of walls, anchors as hereinafter specified shall be built in every 3 feet in height.

All plates shall be set level in a full bed of mortar, and all framing and anchors shall be set and built in as the work progresses, as the leaving of holes and building in framing afterwards will not be permitted.

Where pipes, except wall hydrants, pass through walls, cast-iron or standard galvanized wrought-iron or mild steel pipe sleeves, generally 2 inches greater in diameter than the pipes passing through same, shall be furnished and built in place.

Raglets, dovetail in section, 1½ inches deep, must be formed for all flashings in connections with concrete.

Chases for pipes, etc., shall be straight from bottom to top and have backs plumb.

All surfaces of concrete on the interior of the building which are not to be plastered shall be smooth, the aggregate to be forced from the face by use of a fork or other satisfactory means.

All exterior concrete facing that is cast and set shall be anchored in place in the same manner as hereinafter specified for stonework. Reveals shall be without vertical joints and returns at angles not less than indicated.

The finish surfaces of concrete on the exterior of the building shall be in texture similar to sandstone. It shall be formed at the time of placing the concrete either by giving the forms a thin coat of gauged plaster and spreading the finish coat against same before laying the concrete, or by any other method that will give similar results. No such finished surfaces are to be obtained by plastering on concrete. If the plaster moulds above mentioned are used they shall be given a thin coat of paraffin wax before using.

424

The facing of concrete on the exterior of the building, including that below the first floor shall be composed of one volume of Portland cement and three of light gray granite screenings that will pass a No. 30 mesh sieve except that neat cement shall be used for small enrichments. It shall be made with the use of as little water as is practicable. The mortar must be forced into the forms so as to form full and true angles. Angles shall be slightly rounded, but as sharp as practicable. The facing shall be nowhere less than ¼ inch thick, but in all places thick enough to prevent the aggregate of the coarse concrete from becoming exposed. Ornament, whenever necessary, shall be reinforced with galvanized mesh or rods.

All finished surfaces shall be stopped and cleaned up as soon as forms are removed and be kept moist and be protected from the sun for at least thirty days after being placed.

The surfaces shall be free from water cracks, stains, spots, ridges, bulges, bubble holes, pits, scales, or other defects.

Floors, etc.—Basement and area floors and all concrete with metal reinforcement shall be composed of one volume of cement, two of sand, and four of stone or gravel aggregate.

Cement finish of floors and steps shall be 1 inch thick composed of two volumes of Portland cement and three of sand, with only enough water to make a stiff mortar.

It must be applied before the concrete base commences to set and be troweled to a smooth, even surface.

Dry cement must not be used while finishing. Outside steps shall have ⅛ inch wash.

The earth under basement and area floor must be thoroughly tamped or rolled before laying the concrete base.

Concrete in connection with beams and girders shall be nowhere less than 2 inches thick, the concrete on the soffits of steel framing to be placed entirely from one side and tamped until it is forced through to the other side. The concrete shall be thoroughly worked around all metal, bars or rods to be lightly tapped during
425 laying of the concrete. The concrete to be jarred with a tamper, but not tamped, so bars will assume normal position and the concrete come in close contact with the metal. The concrete shall be forced into all angles so as to completely fill them.

Surfaces to be plastered shall be treated to form keys, as hereinbefore specified.

Reinforcing metal.—All bars and rods shall meet requirements hereinafter given for structural steel. They shall be free from rust at the time of being placed, be kept straight, and uniformly the distance required. Where not otherwise indicated, the rods shall be placed with the center of the rod 1⅜ inches from the bottom of the concrete. At the bottoms of all openings bars similar to those required for lintels shall be embedded in the concrete 2 inches from the top.

Where reinforcement of concrete is required and rods are not indicated a metal fabric must be employed. The sustaining members of the fabric shall be not less than 3 nor more than 6 inches apart, and they shall have, if of steel, a sectional area of not less than 0.18 square inch, and if of wire, of not less than 0.08 square inch for every foot in width. The metal shall be integral or rigidly attached at least every 8 inches. The metal, if not galvanized, must be free from rust at the time of being placed.

Where metal fabric is placed vertically it shall be near the center of the concrete, and elsewhere it shall be uniformly ¾ inch from the bottom. It must be laid with sustaining members at right angle to and continuous between bearings and be lapped and secured together at joints so as to give equivalent strength with the body of the fabric.

Forms and centers.—Forms and centers shall be of such construction and be secured in place in such a manner as to prevent deflection or vibration. They must not be struck for twenty days after the concrete is placed and shall be removed without shaking or jarring the concrete.

Tests.—Before laying any concrete filling, the contractor shall, where directed, shore the steel beams and test reinforced concrete

floors by placing 10,000 pounds dead load, evenly distributed
426 over 10 square feet of surface. Any work damaged by such tests shall be removed.

Filling.—The concrete filling on the roof shall be composed of one volume of cement, three volumes of sand and seven volumes of clinker or other approved light aggregate. The filling shall be brought to the top of the wood strips and finished level. Just before any filling is done the concrete shall be swept clean, drenched, and covered 1/16 inch deep with neat Portland cement.

Filling under terrazzo and tile floors shall be as hereinafter specified in connection with same.

Stonework.

Quality and kind.—All stone shall be well seasoned, close grained, free from defects and of even texture and color, except that the variations in stone, usually found in first-class work, will be permitted, but such variations must not be caused by spots, iron stains, or other discolorations.

All stone below the first floor line shall be of light colored granite.

Drawings.—Drawings in triplicate, showing the jointing and beds of all stone work, must be furnished, as hereinbefore specified.

Reveals shall be without vertical joints and returns at angles shall not be less than indicated.

Finish.—The finished surface of granite shall be 4-cut.

Window sills shall have raised fillets at the back. Horizontal surfaces of stone coming in contact with masonry shall be axed to a full even bearing and have all unexposed sides and backs pitched off at right angles.

Patching or hiding of defects will not be permitted, and lewis holes must not be made on surfaces which will not be covered.

Setting.—All stone shall be thoroughly clean and wet immediately before being set. Set the stone with uniform close joints in
427 a full bed of mortar and thoroughly fill all joints the face of the joints to be raked out ¾ inch deep for pointing.

Sills, etc., subject to pressure shall be bedded only at ends. Copings at areas shall be cramped together caps of balustrade shall be secured with not less than two dowels to each length, and all stones shall be securely bonded and anchored in place. All anchors, dowels and cramps are specified under "Steel and iron work." Sinkages for cramps on exposed surfaces shall be dovetailed in section not less than 1 inch deeper than the thickness of the metal, and after the cramps are in place the sinkages must be filled with mortar composed of equal volumes of Portland cement and sand, well packed and finished smooth with the surface of the stone.

Pointing.—At the completion of the work all joints must be brushed out thoroughly wet (wetting with a sponge will not be sufficient), and carefully pointed. The mortar must be firmly packed into all joints, completely filling the same.

Brickwork.

Brick.—All brick shall be uniform in size, firm in texture, and free from defects.

All brick for facing of walls, to a height of 7 feet above floor, shall be semiglazed brick of an approved color; other face brick shall be of light gray color and may be approved sand lime brick, but all other brick shall be hard burned. Bats, except for closers, must not be used.

Laying brick.—All facing brick shall be bonded by laying every sixth course a full header course, in brick walls headers to extend entirely through walls the headers in successive courses to overlap. Lay all bricks with close joints, shoving each brick on a full bed of mortar and thoroughly fill all spaces with mortar. All exposed joints shall be struck.

All brick shall be drenched immediately before being laid.

428 Arches, etc.—All face brick for arches shall be molded on ground to the true radial lines of the arch and so as to give smooth soffits. Skewbacks shall have full bearings.

Centers.—Centers for arches must not be struck until the mortar has set.

Cleaning.—Upon completion of the work the brickwork must be cleaned with an approved wash containing no acid.

Steel and Iron Work, etc.

* * * * * * *

Setting.—All steel and iron work must be accurately set and substantially secured in place as the work progresses. The contractor will not be permitted to proceed with masonry, leaving openings in which to install steel later.

* * * * * * *

Approaches.

NOTE.—All work in connection with approaches shall correspond with and be performed in the same manner as work in the building, unless otherwise indicated.

Bidders are required to state on the proposal sheet amount included in the proposal for work and materials required for the completion of the approaches.

Foundations.—Broken stone or gravel for foundations shall be not larger than 3 inches, to be thoroughly rolled or tamped in place, and all earth shall be well tamped or rolled before placing the foundations.

Curbs.—All street curbs and all sunk curbs and all corners shall be of granite. The finish on curbs shall extend at least 2 inches below the finish grade.

Walks and platforms.—The concrete base shall be composed of one volume of Portland cement, two volumes of sand, and four volumes ¾ inch stone or gravel aggregate.

Before the concrete commences to set, spread a 1 inch thick finish coat, composed of two volumes of Portland cement and three volumes of crushed granite screenings with only enough water to
429 dampen the mass, and trowel to a smooth, even finish. The top coat shall be carried over the curb to 2 inches below the finished grade line, and dry cement must not be used in connection with the finish.

The walks and platforms shall be laid in alternate blocks about 6 feet square, the intermediate spaces to be filled in after the concrete of other blocks has set. Joints shall have double thickness of asphalt felt and be finished with a U-shaped tool.

Driveway.—The driveway shall be the same as above specified for walks, etc., except that the finish coat shall be 2 inches thick and the finished surface of the block shall be laid off in about 6-inch squares, the joints to be finished as above specified.

Protecting concrete.—All concrete construction in connection with approaches shall be kept moist and protected from the sun until the cement has set, then covered with 1 inch of sand, which must be kept wet and removed after six days.

Grass, etc.—All filling shall be puddled in 1-foot layers. The upper 10 inches of all grass areas shall be of good rich loam, which must be prepared for planting.

Alternate Construction.

NOTE.—All workmanship and materials under any alternate must conform strictly with similar work hereinbefore specified, and should any alternate construction be accepted which contains materials differing from that hereinbefore required, samples of the same must be submitted to the Supervising Architect for approval.

Bidders must state on the proposal sheet the amount to be added to or deducted from the proposal for the following alternate construction, and such figures shall include any modification in work as now shown or any additional work that may be required on account of such alternate construction.

Alternate A.—Bidders are requested to submit proposals
430 for substituting any system of reinforcing the concrete floor, ceiling, and roof construction which will withstand the tests specified, the composition of the concrete and the steel framing to remain as specified. Drawings and specifications fully illustrating the method proposed to be used must accompany the proposal.

Under this alternate may be submitted a construction of reinforced concrete beams alternating with hollow concrete filling blocks, blocks to be made of 1-3 mortar. Reinforcing rods must have diagonal shear members, or be bent so as to reinforce beams against shear.

* * * * * * *

Alternate E.—State the amount to be deducted from the proposal if the time for completing the building is extended to the 1st day of December, 1910.

* * * * * * *

Alternate H.—State the amount to be deducted from the proposal if granite facing is changed to concrete. The concrete to be cast and set in place or cast in place or finished in either case as hereinbefore specified for granite.

Alternate I.—State the amount to be added to or deducted from the proposal if exterior concrete above the first floor, now indicated as being made up of separate blocks, is formed and finished in place, finish to be obtained as hereinbefore specified for such work formed and finished in place.

JAMES KNOX TAYLOR,
Supervising Architect.

* * * * * * *

Addendum to the Specification.

All work is to be executed in strict accordance with the specification, dated August 27, 1908, except as modified by this memorandum specification, attention being called to the fact that drawing No. 1 is superseded by drawing No. 1-A, that drawing No. 28 has been omitted, and drawings Nos. 41 and 42 have been added.

The piling are to be of local wood and have concrete cap. The piles shall be perfectly straight and free from defects and
431 all bark shall be removed. The upper end shall have wrought-iron ring at least ½ by 2½ inches, and all piles must be provided with approved metal points. They shall be driven in the same manner as is required for concrete pile, using the following formula for ascertaining the safe carrying capacity:

$$P = \frac{2\ w.\ h.}{S + 1}$$

in which P equals a safe carrying capacity of 15 tons; *w*, the weight of the hammer in tons (which shall be between 2,000 and 3,500 pounds); *h*, the height of the fall of the hammer in feet, and S, the average penetrations of the pile under the last five blows.

Four permanent piles shall be tested to 25 tons during the progress of the work the location for such tests to be selected by the superintendent, who shall report settlements for each 5 tons, loading. The settlements for the 15-ton and the 25-ton loads shall also be reported after having been allowed to stand for twenty-four hours.

All excavations shall be kept practically free from water during the placing of the concrete and until after the concrete has set.

The concrete footings or pile caps shall be composed of one

volume of Portland cement, three of sand, and five of 2-inch gravel or stone aggregate, and it shall be reinforced by two thicknesses of metal fabric, as is required for reinforcing other concrete, the different layers of the fabric to be laid at right angle to each other.

The building shall be completed on or before the 1st day of November, 1912.

The bidders will state under Alternate E the amount to be deducted for extending the time of completion of the building to the 1st day of March, 1913; also the amount to be deducted if the time of completion of the building is extended to the 1st day of July, 1913.

JAMES KNOX TAYLOR,
Supervising Architect.

432 *Memoranda.*

NOTE.—These specifications also described and specified in detail material and work required for steel and iron work, roofiing and sheet metal work, plastering, marble work, wood work, hardware, painting and varnishing, glazing mechanical equipment, plumbing, gas piping, conduit and wiring system, wiring and the invitation to bidders.

Defendant's Exhibit F.

Feb. 16/11.

The Supervising Architect, Treasury Department, Washington, D. C.

DEAR SIR: We are sending you, under separate cover four copies each of drawings #1, 2, and 3, being setting plans of concrete stone for Post Office and Court House at San Juan, P. R., submitted by the Guerini Stone Company for your approval.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.
J. P. CARLIN, *Secretary.*

433 *Defendant's Exhibit G.*

Guerini Stone Co., etc., etc., 88 Broad St., Boston, Mass.

Exterior walls, 26,000 cubic feet.....	$32,000.00
Interior walls, including the backing of the granite, 700 cubic feet.....	" 6,000.00
Floors including the cellar and the cement roof slab. All reinforcements are furnished by the General Contractor. 9,248 square yards.....	26,000.00
	$64,000.00

(Signed) GUERINI STONE CO.
A. GUERINI.

Defendant's Exhibit H [10 *for Identification.*]

Guerini Stone Co., Manufacturers of Silichite, the Ideal Building Stone, and the Guerini Silicoides White Stone; Granite and Marble Composite for Exterior and Interior Work.

88 Broad St.,

Boston, Mass., July 21, 1911.

P. J. Carlin Const. Co., New York City, N. Y.

GENTLEMEN: Your favor of the 20th inst. received. We fear the hot weather is getting on your nerves. In answering our let-
434 ter "Paragraph by paragraph," please note that our first paragraph was meant to refer entirely to the question of our going to Washington together.

At the time of the signing of the contract, the matter of derricks was definitely understood between us. As months went on, you evidently changed your plans entirely without notifying us in anyway. Therefore, when we begun to call for derricks, as originally agreed, you immediately assumed a hostile attitude toward us as though we were in some way to blame. We note what you say regarding charge for the power equipment, and as we understand it, this is already fixed by the contract.

Is it not about time to cut out this letter-writing business and get together for a mutual understanding? There are many points to be cleared up and one very essential thing to us is when we may begin our work. We wish the date of the beginning of our work to be definitely recorded as we have a time limit for doing the work. Will it not be a good plan for us to get together for a talk and also to go into the matter of our doing the work in the field for you?

Yours truly,

GUERINI STONE COMPANY.

Defendant's Exhibit I [16 *for Identification.*]

Sept. 6, 1911.

P. J. Carlin Cont. Co., 16 E. 23rd St., New York City, N. Y.

GENTLEMEN: We have not yet received a letter from you fixing date when we may commence our work at San Juan Job. As there is a fixed time for completion in our contract, we desire to have this date made a matter of record.

Yours truly,

GUERINI STONE CO.

435 *Defendant's Exhibit J.*

88 Broad Street,

Boston, Mass., September 16, 1911.

P. J. Carlin Const. Co., New York City, N. Y.

GENTLEMEN: We herewith acknowledge receipt of your letter of Sept. 15th and copy of your letter of the 15th sent direct to our San Juan office.

We note that you order us to proceed with the granite work which we understand is in accordance with Section No. 25 of the contract. As San Juaan is so far away, please give us as much time as possible in order that we may be prepared to start any work which we are able to do. We cannot land men and equipment on the job without considerable notice.

We have not yet been advised by our representative at the job as to derrick equipment, etc., but presume you have taken care of this matter in full accordance with the terms of the contract.

Yours truly,

GUERINI STONE COMPANY.

Defendant's Exhibit K [9 *for Identification.*]

Guerini Stone Co.

Manufacturers of Silichite, the Ideal Building Stone, and the Guerini Silicoides White Stone; Granite and Marble Composite for Exterior and Interior Work.

88 Broad St.,

Boston, Mass., Aug. 17, 1911.

P. J. Carlin Const. Co., New York City, N. Y.

GENTLEMEN: Basing our figures on the quantities in your letter of July 10, 1911 for the Government Building at San Juan, Porto Rico, we propose to do the following:

436 We will erect the structural steel, ornamental iron work, set 1200 tons of granite in the building, furnish material and make 150,000 to 175,000 cement brick, made of common Portland cement, you to furnish us with a hand machine at the job, having a capacity of 10,000 to 12,000 bricks per day, laying said brick, laying 180,000 English semi-glazed brick which are to line the interior walls from the floor to the 7 ft. mark, all for the sum of Thirty-five thousand Seven Hundred Sixty-one ($35,761.00) Dollars.

In the above you will note that we have based our figures on your delivering all the materials at the building site, except the materials for making the cemeent brick.

We have not been able to make up our price on the sidewalk and curbing, but will send you this in a few days.

We understand that Mr. Guerini is to follow the directions of Mr Stierle regarding the jointing of the work.

Yours truly,

GUERINI STONE COMPANY.

Defendant's Exhibit L [11 *for Identification*].

Guerini Stone Co.

Manufacturers of Silichite, the Ideal Building Stone, and the Guerini Silicoides White Stone; Granite and Marble Composite for Exterior and Interior Work.

88 Broad St.,

Boston, Mass., July 10, 1911.

P. J. Carlin Const. Co., New York City, N. Y.

GENTLEMEN: We have not yet heard from you regarding what date you will make the Washington trip. We must get things in shape so that we can go ahead with our work at San Juan, as the delay is causing us a very large expense.

437 We wish the matter to be recorded by letter as to the date of our beginning work on the San Juan Job, also advise us what you have concluded to do regarding derricks.

Very little work can be done by us until the Department decides on whether or not they wish the joint made in the concrete work so as to give a better appearance between each day's pouring.

Yours truly,

GUERINI STONE COMPANY.

Defendant's Exhibit M.

December 12, 1911.

Guerini Stone Company, 88 Broad St., Boston, Mass.

GENTLEMEN: Replying to yours with respect to granite work for San Juan Postoffice, we would say that we have now delivered nearly 5,000 cubic feet; and, during the preceding month, only 199 cubic feet of granite was actually set. The entire balance, with the exception of some 100 pieces, is now cut at Providence and ready for shipment and we will expect it to be shipped not later than December 20th; and so, therefore, put all of the granite in San Juan, for the building proper, on or about January 1st, 1912. Please bear in mind that there is a considerable quantity down there not set.

You understand that we gave this granite setting to you to keep your men going; and, having the derrick equipment and the power there, we could have done this setting ourselves. Unless there is some satisfactory reason for this poor showing on the setting of the granite during the last month, we shall be obliged to set the remainder ourselves as this work cannot be longer delayed. We understand Mr.

Guerini is now in Boston. Please let us know what your intentions are with respect to this granite work.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.
—— ——, *Secretary.*

438 *Defendant's Exhibit N.*

December 14, 1911.

Guerini Stone Co., 88 Broad St., Boston, Mass.

GENTLEMEN: Receipt of yours of December 13th, with respect to the San Juan, Porto Rico, work, is acknowledged. As you are informed in ours of December 12th, there are 5,000 cubic feet of granite at Porto Rico, of which less than 500 cubic feet has been cut. The balance, to which we referred in ours of the 12th inst., is ready with the exception of probably 100 odd pieces, and will be shipped from Providence within ten days. The remaining 100 more or less pieces will be sent forwarded on steamer before the first of the year. From this you can plainly see there can be no reason for delay; and we sincerely trust that you will at once notify us of your intention to put sufficient men on the work to complete it as requested.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.
—— ——, *Secretary.*

Defendant's Exhibit O.

New York, Dec. 29/10.

Received from the P. J. Carlin Construction Co., 1 complete set of plans & specifications for the Post Office & Court House, San Juan, P. R.

A. GUERINI.

439 *Defendant's Exhibit P.*

April 3, 1912.

Guerini Stone Company.

GENTLEMEN: The receipt of yours of March 29th is acknowledged. Regarding the work in the foundations, it is believed that all of the work outlined by the Government engineers will require about two months to completely finish. The entire South wall and the entire East walls, however, will be completely ready for your work in not more than two weeks and the only delay will be on the North wall. As you have much exterior form work to prepare, in advance of pouring the concrete, it certainly seems that this should be done now.

Upon my arrival, the writer endeavored to use your men wherever possible but for some reason they refused. We are ready now to use these men, and can see no reason to pay you a percentage on their

wages as their cost to us is more than local labor. Again, the object of using them is of mutual benefit, to keep them here and expedite the progress of your work.

In this matter of the concrete mixer and appurtenances, we desire to us- it only on the North walls and possibly a few center piers. As we can only use it spasmodically, it would be manifestly unfair to charge us for its continuous time. We are willing, *to* however, to pay $8.50 per day, and nothing less than ½ day to be chargeable, for the actual time in use.

Respectfully,

(Signed) P. J. CARLIN CONST. CO.
J. P. CARLIN.

440 *Defendant's Exhibit Q.*

San Juan, P. R., May 31, 1912.

P. J. Carlin Const. Co., San Juan, P. R.—Mr. Oaksmith.

DEAR SIR: As requested by you today, I herewith give you our sale price on our concrete outfit now in place at the new P. O. & Court House, San Juan. Our 22 H. P. double drum electric winch, ½ yd. Smith mixer, Ransom concrete elevator with steel bucket and fall, side dump car with track, runways, cement storage shed we will sell to you for the sum of Twenty-three hundred thirty-four dollars ($2,334.00) cash, to be paid us on or before the day we deliver the outfit over to you. This offer we will hold open to you until the 21st of June 1912 except that we reserve the right to sell or dispose of the articles mentioned above at prior sale in the meantime. Make check payable to H. P. Converse & Co.

Yours truly,

H. P. CONVERSE & CO.,
By G. A. FOLLETT, *Agent.*

Defendant's Exhibit R [4 *for Identification.*]

Guerini Stone Co.

Manufacturers of Silichite, the Ideal Building Stone, and the Guerini Silicoides White Stone; Granite and Marble Composite for Exterior and Interior Work.

88 Broad St.,

Boston, Mass., Dec. 18, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: We have called Mr. Guerini to Boston and after a lengthy consultation with him, have not found in him any
441 animosity toward the Carlin Co. or its representatives. The knub of the situation seems to be in your clause 10 of the contract which we endeavored to have you modify.

Mr. Guerini, in his very poor English has endeavored to protect the Guerini Co. under this claim by talking directly to your representative at the job. This of course is entirely wrong. He should have given your representative written notice of any discrepancies and then waited a reasonable time for you to correct them. We have issued orders to give all of these notices in writing hereafter.

Yours truly,

GUERINI STONE COMPANY.

Defendant's Exhibit S [3 *for Identification.*]

Guerini Stone Co.,

Manufacturers of Silichite, the Ideal Building Stone, and the Guerini Silicoides White Stone; Granite and Marble Composite for Exterior and Interior Work.

88 Broad St.,

Boston, Mass., Dec. 6, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your favor of the 5th inst. is received and this is the first intimation we have had that an investigation was now going on by the Treasury Department.

If Mr. Guerini is responsible for this, he certainly has lost his usefulness on this job and so far as we are concerned, on any other job.

We shall go thoroughly into the matter with Mr. Guerini but would of course prefer to have some information from the Treasury Dept. as to the source of the trouble. There could then be no question in the matter.

Yours truly,

GUERINI STONE COMPANY.
H. P. CONVERSE, *Pres.*

442 *Defendant's Exhibit T* [5 *for Identification.*]

Guerini Stone Co.

Manufacturers of Silichite, the Ideal Building Stone, and the Guerini Silicoides White Stone; Granite and Marble Composite for Exterior and Interior Work.

88 Broad St.,

Boston, Mass., Sept. 23, 1911.

P. J. Carlin Construction Co., 16 East 23rd St., New York, N. Y.

GENTLEMEN: Our contract states that we are to verify and report in the foundation before we start work and that we are responsible

for the correctness of previous work to that extent. We are advised by our San Juan Office as follows:

"Please refer to sheet 41, the foundation and piling plan of the San Juan Federal Building Job. In the S. W. corner of the building there is a small wall for column 17 to the west exterior wall marked 'Tie' on the plan. On this same side of the building there are four other 'Tie' walls, on the north side six and on the east end three. On sheet 42 section D-D shows the elevation of one of these walls. These walls have all been omitted by Carlin and from appearances they are not going to put them in as the column bases and exterior foundation walls are in place and ground brought to grade over most of the area. Mr. Sullivan knew about this omission when he was here as foreman and Mr. Oaksmith the present foreman knows about it.

We do not know whether the government inspector knows of the omission or not."

Please advise us in the matter.

Yours truly,

GUERINI STONE COMPANY.
H. P. CONVERSE, *Pres.*

443 *Defendant's Exhibit U* [6 *for Identification.*]

Guerini Stone Co.

Manufacturers of Silichite, the Ideal Building Stone, and the Guerini Silicoides White Stone, Granite and Marble Composite for Exterior and Interior Work.

88 Broad St.,

Boston, Mass., Nov. 22, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your favor of the 21st inst. is received. If your Mr. John Carlin on the job, will take the matter up with Mr. Follett regarding leaving concrete rough or smooth, or any little thing which you want, we believe that he will be able to put the matter through in such a way as not to cause any friction between your representative and Mr. Guerini. We look to Mr. Follett to handle everything of this kind.

As stated in our last letter to you, we sent down last Saturday a good American Carpenter foreman and two good granite setters. They are good all around men on rigging or on hoisting engines and anything of that nature.

Yours truly,

GUERINI STONE COMPANY.

Defendant's Exhibit V [15 *for Identification*].

Dec. 29, 1911.

Mr. A. C. Lootz, San Juan, P. R.

DEAR SIR: Please note the following paragraph in our contract with P. J. Carlin Const. Co.

25th.

444 The General Contractor agrees to furnish derricks complete, and one engine, the sub-contractor to pay all costs of operating same when used by him.

On Dec. 27th we interviewed Mr. Carlin in New York and were assured by him that regardless of what may have been said at Porto Rico, the contract was clear that we were to pay only for cost of operating while we use the derricks, and the general contractor will maintain derricks capable of swinging the job. The Contract contemplated no necessity of our sending any equipment to hoist materials. The cost to us of using the derricks provided by general contractor is the actual cost while we are using the derricks.

Yours truly,

GUERINI STONE COMPANY.

E. P. B.-S.

Copy to Carlin, New York.
" " Porto Rico.

Defendant's Exhibit W.

Guerini Stone Co.

Manufacturers of Silichite, the Ideal Building Stone, and the Guerini Silicoides White Stone, Granite and Marble Composite for Exterior and Interior Work.

88 Broad St.,

Boston, Mass., Oct. 21, 1911.

P. J. Carlin Const. Co., New York City, N. Y.

GENTLEMEN: Under date of Oct. 13th we are advised by our San Juan Office that they have not been able to commence work up to that date on our concrete work, as the job was not ready for

445 it. They also state that they started to set granite in the south west corner, but on account of some question as to measurements, were unable to proceed with the work. They then started to set granite on the southeast corner on the morning of Oct. 13th and found that there was some question for Mr. Stierle and Mr. Oaksmith to settle at this point.

You will note therefore that up to Oct. 13th, they have been unable

to proceed with our work, owing to the fact that it is not ready for us. As we have a time contract with you, it is very important that the building should be turned over to us in such quantities as to enable us to proceed with the work continuously and at such rate as will insure our completion within the terms of the contract.

Your- truly,

GUERINI STONE COMPANY.
H. P. CONVERSE, *Pres.*

Defendant's Exhibit X.

Guerini Stone Co.

Manufactureres of Silichite, the Ideal Building Stone, and the Guerini Silicoides White Stone, Granite and Marble Composite for Exterior and Interior Work.

88 Broad St., Boston, Mass., Feb. 5, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your favor of the 3d inst. is received. We have this day taken up the matter of forms, but as it is our intention to build these in place and pour most of the concrete, we presume very little of this form work can be gotten ready ahead of time. However, we will do all that is possible to do.

446 If Mr. Carlin is to sail on the 17th for San Juan, P. R., the writer will be glad to avail himself of your offer to make a reservation for him at the same time you do for yourself.

Thanking you for your kindness in the matter, we remain.

Yours truly,

GUERINI STONE COMPANY.
H. P. CONVERSE, *Pres.*

Defendant's Exhibit Y.

Guerini Stone Co.

Manufacturers of Silichite, the Ideal Building Stone and the Guerini Silicoides White Stone, Granite and Marble Composite for Exterior and Interior Work.

88 Broad St.,

Boston, Mass., Feb. 26, 1912.

P. J. Carlin Construction Co., New York, N. Y.

GENTLEMAN: In reference to Article II of agreement regarding work at Porto Rico, please note that on Feb. 17th we notified you at Porto Rico that we wanted reinforcing steel for first floor in S. W. corner and on Feb. 21st we had not yet received same.

This delay is beyond our comprehension you have not delivered at

the building site the reinforcement for the first floor, how can you be urging us to greater progress building the floors?

Yours truly,

GUERINI STONE COMPANY.
E. P. BLISS.

447 *Defendant's Exhibit Z.*

Feb. 28, 1912.

(Carbon Copy to San Juan, Porto Rico.)

Guerini Stone Co., #88 Broad Street, Boston, Mass.

GENTLEMEN: We have yours of February 26th, regarding the work at Porto Rico, and, with special reference to the reinforcing steel for first floor, we would advise you that this reinforcing went forward on October 21st, 1911, and was received at Porto Rico on November 3rd, 1911.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.
(Signed) J. P. CARLIN, *Secretary.*

Defendant's Exhibit AA [14 *for Identification*].

Guerini Stone Co.

Manufacturers of Silichite, the Ideal Building Stone and the Guerini Silicoides White Stone, Granite and Marble Composite for Exterior and Interior Work.

88 Broad St.,

Boston, Mass., Dec. 29, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Pursuant of your several letters to us of recent date (your last three or four letters) please note we have sent our Mr. Lootz to San Juan to take charge of the work and all communications which your representatives on the job desire to make
448 to us should be made to him. Any matter which your New York office directs, will you not kindly send to us at Boston.

Yours truly,

GUERINI STONE COMPANY.
H. P. CONVERSE, *Pres.*

Defendant's Exhibit BB.

June 20, 1911.

The Guerini Stone Co., 88 Broad Street, Boston, Mass.

GENTLEMEN: Regarding your letter of yesterday in the matter of the Post Office building at San Juan, Porto Rico, cast concrete work,

it seems that the Government requires a sample of the finish you expect to get in pouring successive days' work, and how you intend to get this finish and until that sample is forwarded to Washington with a description of the method to be used, the Government naturally cannot pass upon it. The Government states emphatically however that plastering on the surface will not be permitted, although it is stated to the contrary on the Full Size drawings.

The writer expects to be in Washington next week, and if you want any further information, please let me know if you will be ready to go to Washington on a telephone sent the night before.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.

—— ——, *Secretary.*

J. P. C./K. M. Z.

Defendant's Exhibit CC.

San Juan, P. R., July 28, 1911.

P. J. Carlin Construction Co.

GENTLEMEN: After I have made several samples, showing the walls, of the Federal Bldg., how they will look if the walls
449 are moulded with joints. Mr. Stierly wrote to Mr. Taylor upholding my theory, to his letter he enclosed a sketch I had made which I am not able to send to you a copy because at present I have not blue print paper. I hope we will soon hear about this matter from Washington, and have the things go smoothly as possible.

Respectfully yours,

GUERINI STONE CO.

A. GUERINI, *V.-P.*

Defendant's Exhibit DD.

San Juan, October 28, 1911.

The Guerini Stone Co., San Juan, P. R.

GENTLEMEN: This is to notify you that the work of stone setting is not progressing as satisfactorily as it should. We were informed a short while ago that you were getting stone setters from the U. S. and that they were to arrive on the Str. "San Juan" which arrived here yesterday, but sorry to say there were no stone setters aboard.

We now insist that you cable at once for two first class stone setters, whether you get them from New York, Boston or any other city is immaterial, but would suggest that you get them from city where they can arrive here in a hurry.

If we fail to receive satisfactory reply and results, to this letter,

we will be compelled to avail ourselves of the clause in the contract relating to such matters.

Hoping that you will comply with our wishes, we remain,

Very respectfully,

THE P. J. CARLIN CONSTRUCTION CO.
D. P. OAKSMITH.

450 *Defendant's Exhibit EE.*

November 14, 1911.

The Guerini Stone Co., San Juan, P. R.

GENTLEMEN: The reports that we received from San Juan, and the photograph showing the progress of the work, indicate clearly that you are not making the progress necessary to complete this work on time. You have had the advantage of familiarizing yourself with the conditions in Porto Rico, and we sincerely trust that you have taken advantage of the opportunity to cast and mould much of your stone for the superstructure.

It is confidently expected that all the granite except the approaches, etc., on the exterior will be delivered on, or before January 1st, but it is urged that you immediately start the cast stone setting without waiting until the granite is levelled all the way around. If you will do this and have moulded your stone considerably in advance, we believe that you will finish the cast stone setting within the following four months. We, of course, agree to see that the other depending work such as the brickwork and the steel erection shall not in any way delay you.

Will you kindly, upon receipt of this give us the status of the work and what your intentions are with respect to a schedule for carrying it out, and completing it.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.

Defendant's Exhibit FF.

San Juan, November 18, 1911.

Guerini Stone Co., San Juan, P. R.

GENTLEMEN: Your favor of even date is at hand; contents of same carefully noted and considered.

451 We fail utterly to see wherein we have been the cause for any friction whatsoever between you and your employes; but we do agree with you, however, on the difficulty of securing proper help in this Island, as witness the very slow progress of the work under question. In this connection we would again ask you when you will have competent stone setters of a sufficient number on this job?

In regard to the various questions raised with us by the Gov't Sup't, this date, which form part of your contract, and of which our Mr. J. J. Carlin spoke to you to-day, we would like a definite under-

standing of your intentions in these various matters which become on your part owing to the insistence of the United States Government Representative.

Kindly give these matters your immediate attention, and oblige,

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.
D. P. O.

Defendant's Exhibit GG.

88 Broad St.,

Boston, Mass., November 18, 1911.

P. J. Carlin Const. Co., New York City, N. Y.

MY DEAR MR. CARLIN: Your letter of the 16th inst. regarding Guerini is received, and I am greatly disturbed over the matter. Mr. Guerini is an Italian and has the excitable nature of his race, and it is too bad if he is doing loose and indiscriminate talking. I would ask that Mr. John J. Carlin, who is in Porto Rico and yourself, be as considerate as you can with him in the matter.

452 I believe him to be a fine able man in his line, and we should be able to hold him down to his particular work and keep him from mixing in in other affairs.

Our Mr. Follett is quiet and careful and I had expected that all intercourse and matters that needed adjustment would — worked out through him, so that there would be no *understandings*.

As you have undoubtedly noticed, Mr. Guerini's English is very bad and in my two trips in Porto Rico, I noticed his very great change for the worse in the English. He seems to have great difficulty in expressing himself and when he does get it out, it seems to explode like gun powder which has been under pressure.

I am glad to note your statement that you will offer what assistance you and Mr. John J. Carlin can in the matter and I have already sent a letter to Mr. Guerini and also to my nephew, Mr. Follett by special messenger, who is leaving New York on the boat today.

We are sending down two good stone cutters and a carpenter and two of the men are especially good all around men.

As soon as I have a letter from Mr. Follett regarding the matter, and in passing I would say that we had a cablegram from him yesterday, I will go to San Juan myself if necessary.

Be assured that we shall take hold of the matter vigorously and have it straightened out and if necessary will take Mr. Guerini away from the job, as we have another man who is capable of modeling and in handling concrete in its most ornate forms.

I thank you for the consideration you have shown us in writing fully in the matter.

Yours truly,

GUERINI STONE CO.
H. P. CONVERSE.

453 *Defendant's Exhibit HH.*

November 21, 1911.

The Guerini Stone Co., 88 Broad St., Boston, Mass.

GENTLEMEN: Yours of November 18th is acknowledged, and we are glad that you appreciate the necessity for harmony. Further letters from Porto Rico show that Mr. Guerini is, if anything, worse than he was before. Also, that the progress which he is making is extremely slow and that he is greatly handicapped because he has no competent help. It seems that he has promised to have an American carpenter foreman and two granite setters. We are certain that it would be economy for you to have these men on the ground, and we earnestly request that you do so, as we cannot possibly make any impression on Mr. Guerini.

Our Mr. John J. Carlin informs us that he tried to get Mr. Guerini to leave the concrete exposed on one side, rough, which had to be subsequently plastered. Notwithstanding that it was evident economy for Mr. Guerini, he insisted on using planed boards and making a plane surface. Your Mr. Follett is evidently an easy man to get along with but Guerini objects to anybody taking anything up through Mr. Follett. Perhaps another strong letter from you to Mr. Guerini would clear the situation somewhat.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.

——— ———, *Secretary.*

454 *Defendant's Exhibit II.*

The P. J. Carlin Construction Co., Building Contractors.

No. 16 East 23rd St.,

New York, Jan. 24, 1912.

Guerini Stone Company, #88 Broad Street, Boston, Mass.

GENTLEMEN: We have yours of January 23rd with regard to monthly payment, and we are still awaiting the monthly estimate of the quantities performed by you under subcontract at San Juan, Porto Rico. In the meantime please let us have a detailed statement from you as to the quantities and unit prices, upon which you based your estimate.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.

J. P. CARLIN, *Secretary.*

Defendant's Exhibit JJ,

88 Broad St.,

Boston, Mass., December 4, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your favor of the 29th ulto., regarding the situation in San Juan is received. We have received no further news as to the situation but have this day cabled to have Mr. Guerini come back to Boston by the boat leaving San Juan Wednesday of this week.

It is our desire to do everything which is possible on our part to make the job run smoothly. When we get a little more information from Mr. Follett, we will come to New York and talk matters over if it seems as though that would benefit both you and ourselves.

455 We hope you will write Mr. John Carlin and call his attention to the fact that Mr. Guerini has been down there since last February, away from his family, with little to do and was very seriously sick through his vaccination for typhoid fever. We do not doubt but that Mr. Guerini is in a highly nervous state and will greatly regret anything which he has said to the detriment of the Carlin Co. or anyone else.

Yours truly,

GUERINI STONE CO.
H. P. CONVERSE, *President.*

Defendant's Exhibit KK.

December 19, 1911.

Guerini Stone Co., 88 Broad St., Boston, Mass.

GENTLEMEN: We have yours of December 18th with reference to the San Juan, P. R. work, and we are glad to know that Mr. Lootz will take charge of Porto Rico. Mr. John J. Carlin will be directed and requested to assist Mr. Lootz in every manner possible.

Regarding the granite, we have at the present time between 4,000 and 5,000 cubic feet actually on the site. This constitutes between 80% and 85% of the total quantity required for the work. The entire balance is completely cut and boxed at Providence, and a lighter is on its way to Providence to pick this up for delivery to Erie Basin in New York. This granite goes forward on December 30th and will be in Porto Rico within five days thereafter. This is all of the granite required for the building excepting only the approach and the curbing.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.
———, *Secretary.*

456 *Defendant's Exhibit LL.*

February 3, 1912.

Guerini Stone Co., 88 Broad St., Boston, Mass.

MY DEAR MR. CONVERSE:

Attention of Mr. Converse, *re:* San Juan, (P. R.) Post Office.

We are in receipt of a letter from Porto Rico stating that the new superintendent, Mr. Berryman, has requested that the forms for the artificial stone work be gotten out at once in order that there may be no delay. We were under the impression that most of this work was ready. Will you kindly take it up at once and urge haste in the matter; and also that the specification requirements with respect to heavy dressed lumber be followed. There ought to be considerable of this dressed lumber, such as is used by pattern makers, and we think that a good deal of it could be prepared now.

The writer, at the present time, expects to sail on the 17th of February and will, if you say so, make reservation for you at the same time. If I change or find it impossible to go, I will inform you at once.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.
——— ———, *Secretary.*

Defendant's Exhibit MM.

May 31, 1912.

Guerini Stone Co., 88 Broad Street, Boston, Mass.

Re: San Juan (P. R.) Post Office.

GENTLEMEN: We have yours of May 22nd, 1912, received on May 29th, in which you abandon your contract for the cast con-
457 crete and other work in the San Juan Post Office and Court House. Said letter is a breach of contract on your part, and we shall immediately proceed to have the work done by other parties, and shall charge you with the additional expense, if any, above your contract price.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.
J. P. CARLIN, *Secretary.*

Defendant's Exhibits NN, OO, PP.

Are Account Books of Defendant.
See infra, pp. 337, 349.

Defendant's Exhibit QQ.

San Juan, Nov. 20, 1912.

Articles of Agreement.

Made the Twentieth day of November in the year one thousand nine hundred and twelve by and between P. J. Carlin Construction Company, parties of the first part (hereinafter designated the General Contractors) and Anabile Guerini party of the second part (hereinafter designated the Sub-Contractor).

Witnesseth that the Sub-Contractor, being the said party of the second part, in consideration of the covenants and agreements herein contained on the part of the General Contractors being the said parties of the first part, does covenant, promise and agree with the said General Contractors, in manner following, that is to say.

1st. The Sub-Contractor shall and will well and sufficiently perform and finish in a thoroughly workmanlike manner under
458 the direction and to the satisfaction of the General Contractors and James Knox Taylor Architect (Acting as agent of the owner) or his or its representative and agreeable to all the provisions of the General Contract entered into between the P. J. Carlin Construction Co. and the Government of the United States under date of December 10th, 1910, a copy of which the sub-contractor acknowledges he has seen.

To furnish and set in position, including the concrete backing all the imitation sand stone; and also to make good the facing below the first floor line wherever it may be necessary and where constructed in error by the Guerini Stone Company. This work is also understood to include the imitation sand stone work and backing in connection with the approaches and any other imitation sand stone work and backing of the exterior of the building mentioned in the general specifications and shown on the plans, as of this date.

It is understood that all metal reinforcement contained in this concrete work is to be delivered by the General Contractor to the site and to be taken therefrom and placed in position by the Sub-Contractor for and at the San Juan Post Office Building at San Juan, Porto Rico, agreeably to the drawings and specifications, made by the said Architect (copies of which have been delivered to the Sub-Contractor), and to the dimensions and explanations thereon, therein and herein contained, according to the true intent and meaning of said drawings and specifications, and of these persents, including all labor and materials incident thereto, and shall provide, at his own expense, all scaffolding, implements, apparatus, moulds, models, hoisting and cartage necessary for the performance of said work or works.

2d. The Architect or General Contractors shall furnish to the Sub-Contractor drawings and explanations necessary to detail and illustrate the work to be done, and the Sub-Contractor shall conform to the same as part of his contract, and in the event of any doubt or

question arising respecting the true meaning of the drawings and specifications, the decision of the Architect thereon shall be
459 final and conclusive. It is mutually understood and agreed that all drawings and specifications are and remain the property of the Architect, and upon the completion of the work, are to be delivered to the General Contractors.

3d. No alterations shall be made in the work or materials shown or described by the drawings and specifications, except upon a written order of the General Contractors, and when so made, the value of the work and materials added or omitted shall be computed and determined by the General Contractors, and the amount so determined shall be added or deducted from the contract price, as hereinafter provided.

4th. The Sub-Contractor shall provide sufficient safe and proper facilities, at all times, for the inspection of the work by the Owner, Architect and General Contractors, or the authorized representatives of either of them, and must, upon request of the General Contractors, produce all vouchers showing quality of material used. The Sub-Contractor, shall, within twenty-four hours after receiving written notice from the General Contractors, to that effect, at his own cost and expense, proceed to remove from the grounds or building all materials condemned by the Architect or General Contractors, whether worked or unworked, and to take down all portions of the work which the Architect or General Contractors shall, by like written notice, condemn as unsound or improper or as in any way failing to condemn to the drawings and specifications. Work done or materials furnished by the Sub-Contractor and not approved by the Architect and General Contractors shall not be accepted.

5th. Should the Sub-Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality and quantity, or fail, in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on his part herein contained, the General Contractors shall be at liberty, after three days' notice to the Sub-Contractor to provide any such labor or materials, and to de-
460 duct the cost thereof from any money due or thereafter to become due to the Sub-Contractor, under this contract; and the General Contractors shall also be at liberty to terminate the employment of the Sub-Contractor for the said work, and to enter upon the premises and take possession of all materials and appliances of every kind whatsoever thereon and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Sub-Contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the General Contractors in finishing the work, such excess shall be paid by the General Contractors to the Sub-contractor, but if such expense shall exceed such unpaid balance, the Sub-Contractor shall pay the difference to the General Contractor. The expense incurred by the General Contrac-

tors as herein provided, either for furnishing materials or for finishing work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.

6th. The Sub-Contractor shall and will proceed with the said work, and every part and detail thereof in a prompt and diligent manner, and shall and will do the several parts thereof at such times and in such order as the General Contractors or Architect shall direct and shall and will wholly finish the said work according to the said drawings and specifications — contract in — from the date upon which the building is ready to receive his work and after he has been notified to proceed by the General Contractors, the Sub-Contractor further agrees to begin work at the building within three days from the time that he is notified by the general contractors that the building is ready to receive such work.

7th. The Sub-Contractor shall not cause any unnecessary hinderance or delay to other contractors on said building, and shall
461 bear all damages done to the work of such other contractors by his employees. Should the Sub-Contractor be obstructed or delayed in the prosecution or completion of the work by the neglect, delay or default of the Owner, the Architect, the General Contractors or of any other contractors employed by them upon the work, or by alterations which may be required in said work, or by any damage which might happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the employees through no fault of the Sub-Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be made unless a claim therefor is presented in writing to the General Contractors within twenty-four hours after the occurrence of such delay. The General Contractors shall award and certify, in writing, the amount of additional time to be allowed. The Sub-Contractor may appeal from said award to arbitrators constituted as provided in Article 3d of this contract.

8th. The General Contractors will not, in any manner, be answerable for any loss or damage that shall or may happen to said works, or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing the said works; or for injury to any person or persons, either workman or the public, or for damage to adjoining property, from any cause which might have been prevented by the Sub-Contractor or his workman, or by anyone employed by him, nor will the General Contractors be answerable or accountable for violation of any letters patent or patent rights, or any infringement thereof by the Sub-Contractor, or by reason of the use by the Sub-Contractor of any art, machine, manufacture or composition of matter on said works in violation of any patent or patent rights or infringement thereof, against all which injuries and damages to persons and property the
462 Sub-Contractor having control over such work must properly guard and hold the General Contractors harmless and must make good all damage from whatever cause, being strictly

responsible for the same. Where there are different contractors employed on the works, each shall be responsible to the other for all damage to work, to persons or property or for loss caused by neglect, by failure to finish work at proper time and preventing each portion of the works being finished by the several Sub-Contractors, in the time named in this contract for completion, or from any other cause; and any Sub-Contractor suffering damage shall call the attention of the General Contractors of the same, for action as laid down in Article 3d of this contract.

9th. The Sub-Contractor shall, at his own cost and expense, apply for and obtain all necessary permits and the Sub-Contractor further agrees that all work performed and all materials furnished by him under this contract shall comply strictly with the laws and ordinances in force in the locality in which the building is erected, and that he will comply promptly with all ordinances, regulations, rules and orders of the city government and of any and all of its departments and bureaus, and that he will so perform said work and furnish said materials in accordance with such laws and ordinances, and so comply with such ordinances, regulations, rules and orders whether the work and materials for the same are or are not included and provided for in the plans, drawings and specifications; and all such work and materials made necessary by such laws, ordinances, regulations, rules and orders in order to complete the work contemplated in this contract shall be performed and furnished without extra cost or expense to the General Contractors. The Sub-Contractor will be responsible for a violation of any such laws, ordinances, rules and orders, and will indemnify the General Contractors for any loss or damage resulting to them by reason of any such violation.

10th. Should the proper, workmanlike and accurate performance of any work under this contract depend in any way upon the proper, workmanlike or accurate performance of any work by an-
463 other contractor on said building, the Sub-Contractor agrees to use all means necessary to discover any defects in such contractor's work, and to report the same, in writing, to the General Contractors before proceeding with his work which is so dependent; and shall allow to the General Contractors, a reasonable time to remedy such defect, it being the intention of the parties hereto that the entire work on said building shall be properly performed in a workmanlike manner.

11th. The General Contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Sub-Contractor, agree that they will reimburse the Sub-Contractor for such loss; and the Sub-Contractor agrees if he shall delay the material progress of the work so as to cause any damage for which the General Contractors shall become liable, then he shall make good to the general contractors any such damage—over and above any damage for general delay herein otherwise provided; the amount of such loss or damage, in either

case, to be fixed and determined by the Architect, or by arbitration as provided in Article 3d of this contract.

12th. It is hereby mutually agreed by the parties that the sum to be paid by the General Contractors to the Sub-Contractor for said work and materials shall be Thirty-five Thousand, one hundred and fifty Dollars ($35,150.00) subject to the additions or deductions as mentioned hereafter and herein provided, and that such sums shall be paid in current funds.

13th. It is further mutually agreed between the parties hereto that no payment made over this contract, shall be conclusive evidence of the performance of this contract, either wholly or in part, against any claim of the General Contractors, and no payment shall be construed to be an acceptance of any defective work.

464 14th. In case the nature of the damages or defects of any particular work or works is such that in the judgment of the General Contractors it is not expedient to have the work corrected the general contractors shall have the right to take such sums of money from the amount due to the Sub-Contractor, on the final settlement of the accounts as the General Contractors consider a fair and reasonable remuneration for the difference in value of the materials or work furnished from that specified or for the damage to the complete work.

15th. The Sub-Contractor will insure the works to cover his interest in the same from time to time; and for any loss of the Sub-Contractor by fire the General Contractors will not, under any circumstances, be answerable or accountable; but the General Contractors may protect the works at their option, by insurance to cover their interest when payments have been made to the Sub-Contractor.

16th. The Sub-Contractor is to furnish a competent representative who is to be kept constantly on the ground to represent the Sub-Contractor for the purpose of receiving orders, notices and instructions. The Sub-Contractor is also, when called upon by the General Contractors to report the general progress of the work at the building or elsewhere.

17th. In case of day work all vouchers for same are to be delivered to the General Contractors at latest during the week following that in which the work may have been done, and only such day work is to be allowed for as such as may have been authorized by the General Contractors in writing to be so done.

18th. The Sub-Contractor further agrees in all cases of additions and deductions, omissions or substitutions to charge or credit the amounts of same at market rates, and to furnish unit price for all items required by the General Contractors.

465 19th. The Sub-Contractor shall not let, assign or transfer this contract, or any interest therein, without the written consent of the General Contractor-.

20th. The Sub-Contractor shall make no claim for additional work unless the same shall be done in pursuance of written order from the General Contractors, and notice of all such claims shall be made to the General Contractors in writing before the next ensuing payment, or shall be considered as abandoned by the Sub-Contractor.

21st. Wherever notice in writing to be given to Sub-Contractor is herein provided for, a notice mailed to the last known address of the Sub-Contractor shall be sufficient.

22d. The Sub-Contractor further agrees not to display on or about the premises any sign, trade-mark or other advertisement.

23d. The Sub-Contractor further agrees, to guarantee his work and to make good without cost to the Owner or General Contractors any and all defects which may appear during the time specified by the General Contractors in the guarantee.

24th. The Sub-Contractor further agrees that all disputes between himself and his employees shall be adjusted according to the joint arbitration plan of the Building Trades Employers' Association and the representatives of the Unions, as set forth in the document of July 9, 1903.

And the said general contractors hereby promise and agree with the said Sub-Contractor to employ, and do hereby employ him to provide the materials and to do the said work according to the terms and conditions herein contained and referred to for the price aforesaid, and hereby contract to pay the same at the time, in the manner and upon the conditions above set forth.

And the said parties for themselves, their heirs, executors, administrators and assigns do hereby agree to the full performance of the covenants herein contained.

466 In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first written above.

ANNIBALE A. GUERINI. [SEAL.]
J. P. CARLIN, *Pres.* [SEAL.]

In Presence of
FRANK J. LOVERING.

Order Staying Execution.

In the District Court of the United States for Porto Rico.

Law. No. 981.

GUERINI STONE COMPANY, Plaintiff,

vs.

P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

The defendant in this action having moved the Court under Section 987 of the Revised Statutes of the United States for a stay of execution upon the judgment herein for 42 days and for leave to make a motion for a new trial within that time;

It is, after argument by the attorneys for the respective parties and due consideration by the Court

Ordered, adjudged and decreed that the said motion be and the

same hereby is granted and that execution upon the judgment herein be stayed for forty-two days from the date of the rendition of the verdict and that the defendant may file a motion for a new trial within that time all of which is however, upon the condition that within three days from the date of this order the Defendant shall file with the Clerk a bond satisfactory to the Court in the sum of Fifty Thousand Dollars with a surety Company as surety thereon,
467 conditioned to secure the plaintiff herein the collection and payment of the judgment in this action with the interest costs and disbursements incident thereto.

And it is further ordered, adjudged and decreed that in the event the Defendant shall fail to file the aforementioned bond within the said period, then and in that event the time of the defendant within which to file a motion for a new trial in this action under Rule 62 of this Court is hereby extended for the term of twenty-one days, from the date of the rendition of the verdict herein.

Dated, San Juan, P. R. June 13, 1916.

(Sd.) P. J. HAMILTON, *Judge.*

Notice for New Trial.

In the District Court of the United States for Porto Rico.

No. 891.

GUERINI STONE & Co., Plaintiffs,

vs.

P. J. CARLIN CONSTRUCTION Co., Defendant.

Comes now the P. J. Carlin Construction Company, the defendant above named, by Charles Hartzell, its attorney, and thereupon it moves the Court to vacate, set aside and hold for naught the verdict of the jury herein rendered and the judgment based thereon, and to grant to the said defendant a new trial in said cause.

And, as ground for said motion the defendant alleges and states:

468 First. That there was error in the proceedings of the Court in the trial of the case, particularly in this, to wit: That the Court erred in its failure and refusal to give to the jury, for its consideration instructions numbered 6, as prayed for by the said defendant, the said instructions being as follows:

"The Court instructs the jury that it is admitted in evidence that on the 22d day of May, 1912, plaintiff elected to terminate or rescind the sub-contract with defendant. Under these circumstances, you are instructed that plaintiff is not entitled to recover for the actual value of work and materials reasonably and necessarily employed by it in the said work, less the value of any materials remaining in its possession and less any sums already received by it from defendant."

Second. That the damages awarded by the jury in its verdict in

the above entitled cause, against the defendant are excessive appearing to have been given under influence of passion or prejudice.

Third. That the evidence adduced in the case on behalf of the plaintiff was wholly insufficient to justify the verdict of the jury, and that the said verdict is against the law and the instructions given to the jury.

Fourth. For error in law, occurring at the trial, and excepted to, at the time, by the said defendant.

CHARLES HARTZELL,
Attorney for said Defendant.

Denial of Motion for New Trial.

August 21st, 1916.

Come the parties hereto and the defendant calls *his* motion heretofore filed for a new trial of the case, which motion is denied by the Court.

469 *Petition for Writ of Error.*

(Filed August 21, 1916.)

District Court of the United States for Porto Rico.

THE GUERINI STONE COMPANY, Plaintiff-in-Error,

against

P. J. CARLIN CONSTRUCTION COMPANY, Defendant-in-Error.

Your petitioner, P. J. Carlin Construction Company, the defendant in the above entitled action, respectfully shows:

That said action was tried before the Honorable P. J. Hamilton, District Judge, and a jury, in the May Term of the District Court, 1916, and that a verdict was thereupon rendered against the defendant June 8, 1916, and judgment was entered thereon June — 1916, in favor of the plaintiff, as appears from the record in said action.

That in the course of said trial your petitioner took exceptions to certain rulings of the Court and to certain refusals to rule and to certain instructions to the jury, as more fully appears from the bills of exceptions which have been filed and allowed in said action.

That your petitioner respectfully insists that there was error in the Court's making said rulings and instructions and in the Court's refusal to rule and instruct, as more fully appears from the assignment of errors which your petitioner has filed with this petition.

Wherefore your petitioner prays that a writ of error may issue to the Circuit Court of Appeals of the United States for the District of Porto Rico, returnable to the United States Circuit Court of Appeals for the First Circuit, for correction of the errors so
470 complained of, and for such other process as may cause the same to be corrected by the United States Circuit Court of

Appeals for the First Circuit aforesaid, and that said writ of error may be a supersedeas, and that process may be stayed on the judgment.

San Juan, Porto Rico, August 21, 1916.

By Its Attorney, CHARLES HARTZELL.

Assignment of Errors.

District Court of the United States for Porto Rico.

THE GUERINI STONE COMPANY, Plaintiff-in-Error,

against

P. J. CARLIN CONSTRUCTION COMPANY, Defendant-in-Error.

Now, comes the P. J. Carlin Construction Company, the defendant herein, by Charles Hartzell, Esq., its attorney, and makes and files the following assignment of errors, upon which it will rely in the prosecution of its writ of errors herein:

1. The District Court for Porto Rico erred in its construction and interpretation of the contract between the parties, the termination or breach of which is the subject of this action, and in refusing to hold and rule that Clauses 11 and 12 of said contract anticipated and provided for delay on the part of both the plaintiff and the defendant, and fixed the measure of loss or damages or reimbursement, one to the other, in case of breach by the other or one, and that said clauses of the said contract between the parties took
471 this case out of the general rule of law applicable to breaches and terminations causing delay.

2. The said Court erred in not holding and ruling that the parties themselves had made in their contract the measure of losses and damages in case of delay, and that they were each and both bound by the law which they had created by the terms of their contract, and that in case of delay or default on the part of either party to the contract and to this action, the other party could not be deprived of the protection which it had under and by the terms of the said contract between the parties.

3. The said Court erred in permitting the case to go to the jury under instructions which permitted or allowed a verdict to be rendered in a sum greatly in excess of the measure of losses and damages fixed by the parties in and by the terms of the contract between them.

4. The said Court erred in not setting aside the verdict of the jury on the ground that the verdict was excessive, not in accordance with the law of the case nor with the terms of the contract between the parties, by which they were bound and the protection of which said contract the defendant had by the terms thereof.

5. The said Court erred in submitting the question to the jury as to whether the defendant had committed a breach of its contract which would warrant the plaintiff in terminating the contract, for the reason that the contract shows that the parties con-

templated and anticipated delays; that by an express provision of the contract the measure of damages or remuneration to the plaintiff by reason of delays by the defendant was fixed, in the following language:

"11th. The general contractors will provide all labor and materials not included in this contract, in such a manner as not to delay the material progress of the work, and in the event of failure so to do thereby causing loss to the sub-contractor, agrees that if he shall delay the material progress of the work so as to cause any
472 damage for which the general contractors shall become liable, then he shall make good to the general contractors any such damage—over and above any damage for general delays herein otherwise provided; the amount of such loss or damage in either case to be fixed and determined by the architect or by arbitration, as provided in Article 3d of this contract."

6. The said Court erred in not instructing the jury that the measure of damages from any delay caused by the defendant to the plaintiff was the plaintiff's actual loss during the period of delay.

7. The said Court erred in not directing and instructing the jury that any verdict for damages by reason of delay to plaintiff's work, by defendant's failure to furnish labor and materials not provided for in plaintiff's contract, must be limited and confined to the actual losses of the plaintiff during the period of delay.

8. The said Court erred in allowing interest on the verdict for damages as stated by the jury, for the reason that the said losses and damages were unliquidated and there is nothing to show what part of said verdict was for losses due to delay or what part was for prospective profits or otherwise.

9. The said Court erred in refusing to hold and rule that the measure of damages which the plaintiff was entitled to recover from the defendant by reason of any delay caused by defendant in failing and refusing to furnish labor or materials or a stable foundation for the building, was the plaintiff's actual losses and damages during the period of delay, as stipulated and provided for in the contract between the parties.

10. The said Court erred in its instruction to the jury as follows:

"A contract is an agreement by two people to do a certain
473 thing for a certain consideration. That is all a contract is. And it may be for the making of a pair of shoes, or it may be to put up a federal building. The principle is identically the same. When people enter into a contract, they have got to carry it out. If little things occur in the course of a large contract, it does not justify either one side or the other in throwing up the contract. If he does, he is liable in damages in his turn, but there is, of course, a limit to forbearance in a case of that sort and in all cases."

11. The said Court erred in its instruction to the jury as follows:

"A contract, if it is broken in a material part, in a substantial part, so that it does not make the same contract, that is the test, it can be thrown up by the party who is injured. He has a right to do it. There are two ways of doing it. He may rescind the contract and

seek what is called a quantum meruit of what he has earned on it. That is one way of getting at it. Another way is to take the contract as a whole, terminate it, and then the measure of damages is double. The man who is injured, if that be the case, is entitled to be put back where he was. You can see that is the substance, that is the object of all law."

On the ground it is not the law of this case.

12. The said Court erred in its instruction to the jury as follows:

"The object is to put a man back where he was, to reimburse him, and when it comes to a violated contract, there are two lines of recovery. He is entitled to recover what he has lawfully expended in trying to carry out his contract. That would cover a number of things. It would cover his own labor. It would cover the labor that he has put on the job. It would cover the material that he has supplied, and perhaps one or two other things but that would
474 be the substantial feature of it on that line."

On the ground it is not the law of this case.

13. The said Court erred in its instruction to the jury as follows:

"The other line of recovery is that where he can show that he would have made a profit, he is entitled to the profit that he has been prevented from obtaining. He can recover what he has actually lost in money or labor or material and he can recover what he would have made if the other party had permitted him to carry on the contract."

On the ground it is not the law of this case.

14. The said Court erred in its instruction to the jury as follows:

"Now that is the contract. The facts seem to be that in January, 1911—now this contract was the 16th of December, 1910—the next month a telegram was sent to the Guerini Company and what the meaning of that telegram was, is for you to determine in view of all the circumstances of the case. Was it a notice to them to start work or was it simply a general notice in connection with the work?"

On the ground that the meaning and effect of the notice is for the Court and not the jury.

15. The said Court erred in its instruction to the jury as follows:

"The work that was to be done under this sub-contract by the Guerini Company was all above the foundation. They had nothing to do with the foundation. If there was any defect discovered in the foundation afterwards, it would be something that the Guerini Company were not responsible for, and it would make no difference whether a defect was there by default of the general contractor or by accident. It would make no difference so far as the
475 Guerini Company was concerned, and you will find that is the most important point in the case."

On the ground that it is not the law of the case.

16. The said Court erred in its instruction to the jury as follows:

"On September 15th was another communication between the parties and that is one of the dates you may determine or may not determine was that upon which the notice called for in the contract to begin work is to be dated from, September 15th. You are to take

that matter and determine whether that was a notice to begin work or whether it began farther back."

On the ground that the meaning and effect of said letters was for the Court and not the jury.

17. The said Court erred in its instruction to the jury as follows:

"In February, I think it was, there seems to have happened an accident of some kind to the foundations. There seems to have been a crack discovered somewhere, I think, on the north side, and that was reported to Washington and Washington sent men here who investigated it with the result that, I think, on March 9th, 1912, it was directed that the work stop. Now, that is the crucial date in the case. On March 9th, the government ordered the work stopped. Now what was the effect of that upon the two parties to this contract? It makes no difference what the effect of it was so far as Carlin was concerned in the dealing of the Carlin Company with the Government. That is not before you at all. Your have got nothing to do with that. And I charge you that whatever defect there was, if there was a defect which led to this stoppage, and the stoppage whether there was any defect or not makes no difference to the Guerini
476 Stone Company. They were entitled by their contract to proceed with their work when the foundation was furnished to them, and, if an imperfect foundation was put up, whether through fault of the defendant or whether there was some old Spanish fortification underneath, it makes no difference so far as the Guerini Stone Company was concerned."

Not the law of this case.

18. The said Court erred in its instruction to the jury as follows:

"If a proper foundation was not furnished to them and the Government stopped work on March 9th and there was no reasonable prospect of their being able to begin work anew within a reasonable time, I charge you that that would constitute on the part of the Carlin Company a substantial breach of the contract with the Guerini Stone Company. If it was something that could be rectified in a few days, that would be a different matter. The contract contemplates a delay of a few days at a time. All large contracts must contemplate that."

19. The said Court erred in its instruction to the jury as follows:

"It is impossible to foresee beforehand all the delays that may occur, but if it was evident to the parties that there would be a long delay or an indefinite delay or if it was evident that it was impossible to tell when the work could be begun again, then the Guerini Stone Company had a right to terminate the contract. They were not bound to wait around here and await the pleasure of the Government, pleasure, no doubt properly exercised, as to the beginning of the work."

20. The said Court erred in its instruction to the jury as follows:

477 "It seems that some arrangement was made between the government and the Carlin Company as to underpinning the work and this was arranged somewhere about May. But if you thing from the evidence that that was not a matter of a few days,

that it was uncertain when that would be finished, then the Guerini Stone Company had the right to do what they did on May 22d, that is, to give notice to the Carlin Company that the contract, so far as they were concerned, was terminated and that they would hold the Carlin Company responsible for the damages."

21. The said Court erred in its instruction to the jury as follows:

"Now, on May 22d, this contract was terminated by the Guerini Stone Company and one of two things resulted. The result, if the Guerini Stone Company is correct, is that they must be repaid for the expenditures which they laid out in connection with this work, all told, less whatever material was left on hand and could be utilized. Or, if it is in evidence before you that certain material, that is, plant, was to be turned over to the Carlin Company and the Carlin Company used it, of course the Carlin Company ought to pay for that too. And profits if they are shown."

22. The said Court erred in its instruction to the jury as follows:

"On the other hand, suppose that the Guerini Company did not have the right, it was not right under the circumstances, to terminate the contract when they did then they not only lose whatever they put into it, but, by the very words of their contract, they are bound to pay the Carlin Company whatever the Carlin Company is out by not having the contract carried through, the usual agreement, of course. So you see it is of vital importance to determine who was to blame in terminating this contract on May 22d."

478 On the ground that the Court should not have left it to the jury.

23. The said Court erred in its instruction to the jury as follows:

"When one party enters upon the performance of a contract, and incurs expense therein, and being willing to perform, is, without fault of his own, prevented by the other party from performing, his loss will consist of two distinct items of damage; 1st, his outlay and expenses, less the value of materials on hand; 2d, the profits he might have realized by performance which profits are related to the outlays and include them and something more. The first item he may recover in all cases, unless the other party can show the contrary; and the failure to prove profits will not prevent him from recovering. The second he may recover when the profits are the direct fruit of the contract, and not too remote or speculative. In an action for breach of a contract by wrongfully putting an end to it the party committing the wrong is estopped from denying that the other party has been damaged to the extent of his actual loss and outlay fairly incurred."

On the ground that it is not the law of this case as the contract expressly provides a different measure of damages.

24. The said Court erred in its instruction to the jury as follows:

"The contract says that work shall be begun upon three days' notice, etc. You are to determine when that notice was given."

It was a question for Court.

25. The said Court erred in its instruction to the jury as follows:

"The payment provided for is 85% of the work put into the

479 building, but it is to be to the satisfaction of the general contractor. I charge you that that is to be reasonably construed.

It does not mean that Carlin or the defendant company can just say: I will not approve this voucher. If it is shown that there was 85% done, or whatever is shown to have been done, to the extent of 85%, the Carlins are bound to pay monthly; provided the proper voucher has been furnished. It is for you to say whether there is such proof in the case. But the satisfaction of the Carlin Company is to be a reasonable satisfaction."

On the ground that there was no evidence whatever that work had been done to the satisfaction of defendant, and no question for the jury to determine with respect to payments being due.

26. The said Court erred in its instruction to the jury as follows:

"There are two things in this case. Was the termination of the contract by the plaintiff on May 22d rightfully done? That is the first question before your talk about damages. Was the plaintiff right in terminating the contract? The question whether the plaintiff rightfully did that means that he could only do it if the defendant had himself broken the contract.

"A contract, as I explained to you can be terminated only when some substantial part of it has been broken and it is sometimes quite difficult to draw the line but I charge you that there are two or three things which may be taken into account by you as a breaking of this contract, that is, two or three lines of proof which you may or may not think amount to a breaking of this contract by the Carlin Company."

Not a question for jury under evidence adduced. No evidence of breach by defendants, and Court should have so charged.

27. The said Court erred in its instruction to the jury as follows:

480 "On the other hand, if the payments were not properly made, that may amount, if it was a substantial lack of payment, default in payment, to breaking the contract. A contract like this is not made for fun or the honor of putting up a building. That is not it. A contractor does certain work in order to secure certain money, just like everybody else who does certain work in order to get certain pay. And if there is a substantial failure, amounting substantially to the withholding of the whole payment, not necessarily the whole payment, but the bulk of the payment, a man is not bound to go on with a contract under those conditions. You will find that that will depend a great deal upon the question that I called your attention to, whether there was an agreement as to the units or not. If there was an agreement as to units, you will have to take one view of the case, and if you find that there was not, you will have to take another view of the case as to the question of payments. I call it to your attention as being one of the grounds which may or may not exist for Guerini declaring that Carlin had broken this contract."

As being contrary to the law, and contrary to the United States Supreme Court decision on appeal in this same case.

28. The said Court erred in its instruction to the jury as follows:

"As to the matter of foundations, if you find that the Carlin Company failed to furnish the Guerini Company with foundations upon which to put their work, and on May 22d it was in such indefinite

shape that the Guerini Stone Company could not tell when they could begin their work, that was unintentional, no doubt, but still it was a breach of the contract between the Guerini Company and the Carlin Company that would justify the Guerini Company in declaring the contract at an end. That, however, is for you to determine. That is the question of the termination of the contract,
481 whether the Guerini Company had the right on May 22d to terminate the contract. I leave that branch of the case in your hands."

Not the law of the case, and not a question for the jury.

29. The said Court erred in its instruction to the jury as follows:

"If you find that the defendant failed to make payments as called for by the contract, not over 85% and not otherwise in pursuance to the contract, on account of work done by the plaintiff in accordance with the terms of the contract, such failure constitutes a breach of the contract on the part of the defendant, and justifies the plaintiff in stopping work under the contract, and entitles it to recovery from the defendant of damages."

Not the law of the case, and not a question for the jury.

30. The said Court erred in its instruction to the jury as follows:

"Returning now to the question of damages, supposing the first point to be settled in your minds, which I do not direct you at all is settled in estimating the recovery to which the plaintiff is entitled, if you find he was justified in terminating the contract as he did on May 22d upon the principles above given you, you can consider the reasonable expenditures incurred by the plaintiff, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract. So the different items that you may, if you come to the question, take into account are the outlays less the material on hand, the amount of work actually performed and the profits, if you find there were any which were not speculative."

As not a proper statement of the measure of damage.

482 31. The said Court erred in its instruction to the jury as follows:

"The measure of profits is the contract price less what is shown to you as the expense of carrying out the contract, if that is shown to you to your satisfaction."

"for the expense of carrying out the contrary was not shown, nor separated from preparation and other expenses."

32. The said Court erred in its instruction to the jury as follows:

"If you find that, owing to the acts of the defendant, the plaintiff was prevented from completing the work under the contract during the time set therefor by the contract, or a reasonable extension thereof, then the defendant was guilty of a breach of the contract, and justified the plaintiff in stopping work under the contract, and

entitles it to recover from the defendant such damages as may be proper on the evidence and on the instructions."

33. The said Court erred in its instruction to the jury as follows: "The provision of the contract between the P. J. Carlin Construction Company and the Guerini Stone Company, covering extensions of time beyond the term stated in the contract to the sub-contractor, is not exclusive, and does not bar the sub-contractor from other remedies."

34. The said Court erred in its instruction to the jury as follows: "In case you find that the defendant broke its contract with the plaintiff and find a verdict for the plaintiff, you may allow the plaintiff interest at the rate of six per cent per annum from the date of defendant's breach of the contract up to today upon that
483 portion of plaintiff's damages which was at the time of the breach capable of being definitely ascertained by computation."

35. The said Court erred in its instruction to the jury as follows: "You are instructed that by the express terms of the 11th paragraph of the contract between the parties the defendant was under the obligation to "provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work." Applying this to the facts of the case, defendant was bound to furnish the foundation in such manner, that plaintiff might build upon it without delay. And if defendant failed to furnish the foundation in such manner, it is liable to plaintiff for loss thus caused to it."

36. The said Court erred in its instruction to the jury as follows: "Furthermore, in case defendant, by failing to provide labor and materials, including the foundation, delayed plaintiff to the extent of preventing plaintiff from completing its work within the contract period, then and in that case, defendant is liable to plaintiff for all reasonable expenses incurred including the unavoidable losses incident to stoppage, and also the profits, if any, which plaintiff could have made if allowed to complete the work under the contract."

On the ground that the charge is erroneous without modification as to what had taken place before, and the waivers of plaintiffs.

37. The said Court erred in refusing the request of defendant's attorney, to have the jury state or fix the date from which the interest allowed was computed, as shown by the following:

"Mr. Dexter: Will your Honor permit a question to the
484 Foreman as to the date from which that interest was computed?

The Court: You may poll the jury, if you wish.

* * * * * * *

The Court: Mr. Dexter, I will allow you to ask this one question of each juror, whether it is his verdict.

Mr. Dexter: I intend on behalf of the defendant to poll the jury through its Foreman as to the time of the computation of the interest.

The Court: No, sir; that will have to speak for itself. It is six per

cent and you can figure back for what it is. You may ask them simply as to whether it is their verdict; that is all.

Mr. Dexter: Allow an exception, your Honor.

The Court: Mr. Clerk, you will receive and enter the verdict as the verdict in the case."

38. The said Court erred in refusing defendant's third request for instruction to the jury as follows:

"The Court instructs the jury that when the Plaintiff, the Guerini Stone Company, entered into the sub-contract with the defendant, the P. J. Carlin Construction Company, *entered into the sub-contract with the defendant, the P. J. Carlin Construction Comapny* it was under the obligation to perform the said contract unless its performance was rendered impossible by the Act of God, the law, or the other party. The Court instructs you that unforeseen difficulties, however great, will not excuse the plaintiff from the performance of the sub-contract on its part."

39. The said Court erred in refusing defendant's fourth request for instruction to the jury as follows:

"The Court instructs the Jury that under the evidence it cannot find that defendant caused any delay to Plaintiff prior to October 16, 1911."

485 40. The said Court erred in refusing defendant's sixth request for instruction to the jury as follows:

"The Court instructs the jury that it is admitted in evidence that on the 22d day of May, 1912, Plaintiff elected to terminate or rescind the sub-contract with defendant. Under these circumstances you are instructed that plaintiff is not entitled to recover assumed or expected profits and only recover for the actual value of work, less the value of any materials reasonably and necessarily employed by it in the said work, less the value of any materials remaining in its possession and less any sums already received by it from defendant."

41. The said Court erred in refusing defendant's seventh request for instruction to the jury as follows:

"The Court instructs the jury that plaintiff was not justified in rescinding or terminating the sub-contract because of the alleged lapse of time."

42. The said Court erred in refusing defendant's tenth request for instruction to the jury as follows:

"The Court instructs the jury that the delay of defendant to make payments on estimates, in the absence of a positive refusal to pay anything, was not ground for a rescission or termination of the contract by plaintiff. The remedy of Plaintiff was, and is, to recover interest on such deferred payments."

43. The said Court erred in refusing defendant's eleventh request for instruction to the jury as follows:

"The Court instructs the jury that as a matter of law under the evidence adduced in this case, it must find the issues herein in favor of defendant upon the cause of action attempted to be set forth against defendant in the complaint filed by plaintiff; the only matter to be decided by you is what damage, if any, you may be

lieve under the evidence in this case, defendant has suffered by reason of the abandonment by plaintiff of the plaintiff's sub-contract with defendant."

44. The said Court erred in refusing defendant's twelfth request for instruction to the jury as follows:

"The Court instructs the jury that as plaintiff unjustifiably rescinded or terminated the sub-contract, defendant had the right under section 5 of the sub-contract to retain any and all sums due the plaintiff, if any, until the completion of the work, and to apply the same upon the cost of doing the work provided for in the sub-contract."

45. The said Court erred in refusing defendant's thirteenth request for instruction to the jury as follows:

"The Court instructs the jury that if you believe from the evidence that defendant delayed in making payment of the estimates and requests presented by plaintiff, still, if you believe that these requests or estimates were the subject of bona fide investigation and discussion, the plaintiff was not justified in rescinding or terminating the sub-contract."

46. The said Court erred in refusing defendant's fifteenth request for instruction to the jury as follows:

"The Court instructs the jury that plaintiff's witnesses have testified that at the time it stopped work under the sub-contract, it had completed 25% of the work called for, and that it had spent a sum therefor slightly in excess of $25,000. Under these circumstances you are justified in indulging in inference that the completion of the sub-contract would have cost a sum in excess of $100,000.00, and hence there would have been no profit but a loss to plaintiff, since it has assumed to do the work called for in the sub-contract for $64,750.

Therefore, even if you believe that defendant gave just cause to plaintiff to rescind the said sub-contract, the latter cannot recover for any expected profits, since there would have been none."

47. The said Court erred in refusing defendant's sixteenth request for instruction to the jury as follows:

"The Court instructs the jury that under the sub-contract defendant is entitled to a reasonable allowance as compensation for the operation of the derricks and engine furnished by defendant to plaintiff and defendant had the right to deduct such expense from the paymen to which plaintiff was entitled for work done by it. There is no evidence to contradict the evidence of the defendant, as to the reasonableness of the compensation in this respect and you shall allow the same as a deduction against the amount for which plaintiff requested payment."

48. The said Court erred in refusing defendant's seventeenth request for instruction to the jury as follows:

"The Court instructs the jury that if you believe from the evidence that as a result of the failure of plaintiff to perform and carry out the sub-contract defendant was obliged to expend a sum in excess of the sub-contract price, then defendant is entitled to re-

cover under its counterclaim, against plaintiff, all sums reasonably and necessarily paid by it in excess of the said sub-contract price."

49. The said Court erred in refusing defendant's eighteenth request for instruction to the jury as follows:

"The Court instructs the jury that the contract could not be modified or altered so as to increase the compensation to the plaintiff except for an adequate consideration. It is in evidence by the testimony of Mr. Converse the President of the Plaintiff Company that in making his demand for payment he stated that he wanted
488 only what was due him under the sub-contract.

It is also in evidence by the testimony of the president of the defendant company that the latter paid plaintiff for all work done and materials furnished in accordance with his request or application upon the basis of 40% per square foot of granite, which was the contract price—$10—per cubic yard on February 2d, and $6.70 per cubic yard March 9th, 1912, and that he did not make any deduction for or on account of engine hire, engineer wages and materials, including coal, oil and waste."

50. The said Court erred in refusing defendant's twenty-first request for instruction to the jury as follows:

"The act of plaintiff in undertaking and doing the setting of granite under the option exercised by defendant sometime prior to September 15, 1911, and without notice to defendant of any complaint as to delay or damages suffered by defendant constituted a waiver of any such delay or damage to plaintiff prior thereto."

51. The said Court erred in refusing defendant's twenty-second request for instruction to the jury as follows:

"The act of plaintiff, in soliciting and making a proposal to set the granite and steel erection to the concrete work, is evidence of a waiver on the part of the plaintiff of any delays that may have occurred prior to said proposal of August 17, 1911."

52. The said Court erred in refusing defendant's twenty-fifth request for instruction to the jury as follows:

"The contract provided that should the sub-contractor at any time refuse or neglect to supply workmen and materials or fail to prosecute the work with promptness and diligence that the defendant should be at liberty after three days' notice to sub-con-
489 tractor to provide any such labor or materials and to deduct the cost thereof from any money due plaintiff under the contract, and the defendant would take possession of plaintiff's plant of all materials and appliances of every kind and to employ others to finish the work and the plaintiff was not by the terms of said contract entitled to any further payment under the contract until the work was finished and then only to any excess of the contract price over and above the total cost of the work to defendant and the cost to defendant was to include not only the expense of furnishing the materials and work, but also any damages incurred by defendants."

53. The said Court erred in refusing defendant's twenty-sixth request for instruction to the jury as follows:

"Plaintiff was not entitled to any monthly or progress payments

until it had complied with those terms of its contract which entitled it to payment.

The contract between the parties required as a condition to payment that the work should be to the satisfaction and under the direction of the defendant and the architect and agreeably to the drawings and specifications.

Plaintiff must show and prove that the work was performed to the reasonable satisfaction of the defendants and the Architect, before they are entitled to payments on account."

54. The said Court erred in refusing defendant's twenty-seventh request for instruction to the jury as follows:

"No monthly or progress payments were due to the plaintiff from the defendant until a written requisitition, on a form supplied by the defendant had been made by plaintiff to defendant which first application was made December 30, 1911.

The withholding by defendant of a part of the monthly or progress payment due January 11, 1912, and of a substantial
490 part of a payment due March 21st., to May 22d, 1912, is not a cause for a termination of the contract by plaintiff; nor will said withholding of payments give to Plaintiff a right to prospective profits as for a breach of the contract *of* the part of defendant."

55. The said Court erred in refusing defendant's twenty-eighth request for instruction to the jury as follows:

"You are instructed that defendant has introduced evidence herein showing that it made a contract with A. Guerini for doing the work which plaintiff had agreed to do and that def-dant paid from Nov. 20, 1912, to Nov. 23, 1913, on account of the said work, the sum of $78,450.83, for a portion of such work.

Therefore if you believe that plaintiff, without reasonable cause and by premature action rescinded its contract, you may allow to defendant the sum so paid by it aforesaid, deducting therefrom such sums as you may find were reasonably expended by defendant to plaintiff in this work after making due allowance for sums already received by plaintiff, and less the value of materials remaining in possession of plaintiff, when it terminated the contract."

56. The said Court erred in refusing defendant's twenty-ninth request for instruction to the jury as follows:

"The Court instructs the jury that in determining whether plaintiff was justified in rescinding the subcontract you shall consider whether the delay alleged if any, was merely a suspension of a temporary character, and if there existed facts upon which to base the reasonable assumption that the contractor was not at fault and that the work would be continued. In this event, if you should so find, then Plaintiff was not justified in rescinding the contract."

491 *Assignments of Error on the Admission or Exclusion of Evidence.*

57. The said Court erred in permitting the plaintiff to amend its complaint at the trial hereof, so as to greatly enlarge the plaintiff's

recovery, and to base its action upon the grounds and for periods not contained in the original complaint.

58. The said Court erred in admitting the letter, Exhibit 9, over the objection and exception of plaintiff's counsel.

(S. M., p. 110).

59. The said Court erred in admitting evidence of a modification of the written contract between the parties and in admitting the following conversation, modifying a written agreement, as recorded in the following question and answer:

"Q. Now, will you state what took place at that conversation?

"A. I explained to him that we had been down on the job almost a year and had received no money, we had made our applications for money and that I was there to get some and I must have it. After a considerable talk back and forth he gave me a check for some thirty-seven hundred dollars, thirty-seven hundred and odd dollars, and I was dissatisfied with the amount and I insisted that we must have a definite agreement as to the amounts that would be paid us, the units as to how they were to be paid, and Mr. Carlin called in a young man and dictated a memorandum and handed it to me and it was agreed between us.

"Mr. Wait: I object to that, 'it was agreed between us.' You can say only what he said and what you said.

"The Court: Yes.

"A. He stated that we would be paid in those units and that we would render our monthly estimates in those units, and I agreed to it and went out.

492 "The Court:

"Q. What was the date of that?

"A. About February 2d in New York City.

"Q. What year?

"A. In 1912, almost a year later.

Mr. Wait: I object to the testimony and move that it be stricken out as immaterial and not within the contract or within the contract terms.

"The Court: The objection is overruled.

"Mr. Wait: Note an exception."

(S. M., pp. 114, 115.)

60. The said Court erred in the admission of the plaintiff's applications for monthly payments and the paper handed to the plaintiff's President at the time the conversation was had, as embodied in the following question and answer:

"Q. Is that the paper that he handed to you at the time that he made that statement?

"A. Yes, sir.

"Mr. Paine. I now offer that in evidence.

"The Court: Any objection?

"Mr. Wait: I do object to it and to the conversation as immaterial, as being an attempt to modify or alter a written contract and being dehors the terms of the contract and there being no consideration for any change or modification of the contract in this manner. There is no pleading that the contract was modified or altered or changed. It is not within the pleadings and I call the attention of the Court in connection with that to the opinion of the Supreme Court of the United States as to this language of paragraph 12, in which it is said that 'There is no clause, such as is frequently found in contracts of this character, that the amounts payable from time to time shall be ascertained and certified by the architect, and no units upon which it is to be determined.' It seems to me you cannot here modify, alter, change and add to a contract and change the means and methods of payment unless it is pleaded and unless there is a consideration.

493 "The Court: The objection is overruled.

"Mr. Wait: Note an exception.

"The Court: The paper is admitted."

(S. M., pp. 115, 116.)

61. The said Court erred in permitting exhibits to be read to the jury, which were not material or competent and which contained self-serving declarations and which prejudiced the defendant in the minds of the jury, over the objection and exception of defendant's counsel.

(S. M., pp. 119, 120, 126-7.)

62. The said Court erred in admitting in evidence plaintiff's Exhibit 14, and permitting it to be read to the jury, over the defendant's objection and exception.

(S. M., pp. 116, 122-3.)

63. The said Court erred in admitting in evidence the estimate, of the plaintiff's president, of the cost of the work included in the contract between plaintiff and the defendant, on the grounds stated in the record and over the defendant's objection and exception.

(S. M., pp. 133-6.)

64. The said Court erred in the admission of evidence by the plaintiff's president as to what elements entered into his estimate of the cost of the work to determine prospective profits, by subtracting his estimate from the total contract price, over the objection and exception of defendant's counsel.

(S. M., pp. 137, 138, 139.)

65. The said Court erred in the admission of evidence of rental charges by H. P. Converse & Co. to the plaintiff for machinery, over the objection and exception of the defendant's counsel.

(S. M., pp. 140-1.)

66. The said Court erred in the admission of evidence of tools and of what the plaintiff's president spent in time on the contract job

in Porto Rico, and at the rate of $25 per day, and of invoices paid on account of said contract for said Porto Rican job, on the ground that it was not a proper proof of a correct measure of damages in the case and no proper charge against the defendant.

(S. M., pp. 142-151.)

494 67. The Court erred in the admission of evidence of memoranda made under the supervision of plaintiff's President, and of the amounts of invoices paid by others than the witness, and of the fact that the records show that it was not within the knowledge of the witness and did not constitute proper measure of damages, as contained in the following:

"Q. Now can you testify as to the amount, can you give the amount of the freight and passenger fares paid at the Boston office on account of materials and men sent to Porto Rico in connection with the work on the Post Office and Federal Court Building in San Juan?

"A. I can.

"Q. Will you state the amount?

"Mr. Wait: Objected to as not the proper measure by which damages can be determined and not being any part of the building structure and not being justifiable charges either against the defendants or for their account.

"The Court: The objection is overruled. It seems to me that apart from the ground on which it is offered, it might be legitimate in another way. There are certain profits claimed and the elements making up the profits are certain estimated expenses. If it is shown that those expenses are larger for having to send men here, it may be that this evidence is legitimate in mitigation of profits. I do not know, but at all events it will be admitted.

"Mr. Wait: Note an exception."

(S. M., pp. 152-9.)

68. The said Court erred in admitting evidence of payrolls paid at Boston on account of laborers employed on the Post Office building at San Juan, P. R., when he had no knowledge whatever that said money was employed for said payrolls and when he, himself, did not make the disbursements; also on the ground that said evidence was not proper measure of damages, as disclosed by the following.

495 "Now do you know the amount of payroll paid at Boston on account of laborers employed on the work on the Post Office building at San Juan?

"A. I do.

"Q. How much is it?

"Mr. Wait: I object, if the Court please, no proper foundation and it is not a proper measure of damages, also it should be shown that the witness paid it himself or that he knows that it went, of his own knowledge to these people.

"Mr. Paine: He says he knows.

"Mr. Wait: His saying that he knows doesn't make it out. There should be a foundation laid for it.
"The Court: The objection is overruled.
"Mr. Wait: Note an exception."
(S. M., pp. 160-1.)

69. The said Court erred in permitting the witness Converse to say and declare repeatedly that "he was in charge of the work," over the objection and motion to strike out by defendant's counsel and exception to the ruling of the Court as set forth in the following and at different places in the testimony, to wit:

"Q. Mr. Converse, Mr. Guerini differed from Mr. Follett in that one respect that Mr. Guerini did things and Mr. Follett looked on, didn't he?
"A. No, sir.
"Q. What did Mr. Follett do down here?
"A. Mr. Follett was agent and in charge of the work.
"—. What did he do?
"A. That is what he did.
"Q. What?
"A. He was in charge of the work.

"Mr. Wait: Now, I move that that be stricken out. That is twice volunteered that he was in charge. I didn't ask him that.

"A. That is what he did. He took charge of the work.

"Mr. Wait: I ask again that it be stricken out. That is the third time.
"The Court: The request to strike out is denied.
"Mr. Wait: Note an exception."
(S. M., pp. 165-6.)

496 70. The said Court erred in excluding evidence as disclosed in the following questions and answers:

"Q. You knew that you couldn't get any money under this contract until the work had been done to the satisfaction of the general contractors, didn't you, from its terms?

"Mr. Paine: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination and calling for a conclusion of the witness as to the meaning — a written contract.
"The Court: The objection is sustained. If that is in the contract, it speaks for itself.
"Mr. Wait: Note an exception."
(S. M., pp. 185-6.)

71. The said Court erred in excluding evidence as disclosed by the following question and answer:

"Q. You knew as a matter of fact, that Mr. Guerini expected to cast this artificial stone in blocks and set it with a derrick, didn't you?

"Mr. Paine: I object to that as incompetent, immaterial and irrelevant and not proper cross-examination and there is nothing of that in the direct-examination and it calls for a conclusion of the witness and the construction of the contract.

"The Court: The objection is sustained. I don't remember anything analogous to that in the direct.

"Mr. Wait: Note an exception."

(S. M., pp. 186-7.)

72. The said Court erred in admitting evidence over the objection and exception of defendant's counsel, as disclosed in the following questions and answers:

"Mr. Wait:

"Q. You don't know anything about how it was done down here, do you?

"A. I am speaking about how we laid out to do it, when we came down here.

497 "Mr. Paine:

"Q. Is the additional expense entailed in putting the smooth finish on the so-called imitation sandstone, which was called for for the exterior walls of the building, substantially greater in amount than the greater expense in connection with the interior walls and floors resulting from the fact that the interior walls and floors are narrow and therefore require more wooden form work per cubic yard of concrete?

"Mr. Wait: I object to this testimony because this witness knows nothing about what was done on this work.

"The Court: The objection is overruled.

"Mr. Wait: Note an exception."

(S. M., p. 243.)

73. The said Court erred in holding the witness Converse an expert and in admitting the evidence disclosed by the following question and answer.

"Q. Let me interrupt, Mr. Converse. If there had been no delay of any kind or anybody, would the amount of concrete poured by you between the time when you started pouring concrete and the time when you stopped have been a fair and reasonable amount of concrete to pour with the men and equipment you had on this job?

"Mr. Wait: I object to that as not having all the foundation it should have, and further, as being speculative purely.

"The Court: The objection is overruled. This is an expert.
"Mr. Wait: Note an exception.
"Mr. Paine: I would like to add; and with reference to this job as appears from the testimony in this trial.
"Mr. Wait: I object to that, as appears from the testimony in this trial. I never heard of a hypothetical question embodying all the tesimony in the trial.
"Mr. Paine: The jury has heard the testimony.
"Mr. Wait: I object to it.
498 "The Court: The objection is overruled. This particular witness has been in the Court room all the time.
"Mr. Wait: Note an exception."
(S. M., pp. 246-7.)

74. The said Court erred in admitting in evidence Exhibit 27, letter dated January 27, 1912, plaintiff to defendant, on the ground that it contained self-serving declarations of the truth of which there was no evidence whatever, and that same tended to prejudice the jury against the defendant, over the objection and exception of defendant's counsel."
(S. M., pp. 264-5.)

75. The Court erred in admitting the evidence as disclosed from the following questions and answers, over the objection and exception of defendant's counsel:

"Q. Can you estimate the amount of concrete that was put in place in that period?
"A. I did not personally make a measurement of that concrete of the last ten days or whatever it was.
"Q. Were you there on the job at the time?
"A. I was there at the job. I have no quantity of that.
"Q. From your knowledge of the amount that had been put in, can you give the jury a fair estimate of that amount?

"Mr. Wait: I object to that, if the Court please. During that period they were replacing a lot of work which had been condemned by the Government and that must be separated.
"Mr. Paine: That does not appear in the question.
"Mr. Wait: It would be a mere guess and it would depend upon a lot of questions which should be shown.
"The Court: The objection is overruled. That would be cross-examination.
"Mr. Wait: Note an exception.

"A. I estimate about 87 yards additional. This 573 cubic yards to which I have testified does not include the yardage in
499 the reconstructed piers."
(S. M., pp. 282-3.)

76. The said Court erred in admitting evidence as disclosed by the following questions and answers:

"Q. Now, can you tell the jury the total amount of concrete that was poured by your company on the job in the San Juan Post Office up to the time when you stopped work?

"Mr. Wait: I object to the form; no foundation for it. It has been shown that this witness does not know; he has only estimated it.

"The question is read for the Court.
"The objection is overruled.

"Mr. Wait: I will add to that objection that this testimony is immaterial as to how much work they had done because there is no claim here of quantum meruit, none being proven, and the amount of work they had actually done up to March is not material because we have what they applied for on March 9th. The trouble between the parties is $1.07.

"Mr. Paine: That is simply to show that that particular application was made on the basis of the unit that Mr. Carlin suggested. Now, as Mr. Castro pointed out, that is not the basis of our suit, except for the indirect purpose of showing the breach of the contract. Our measure of damages is not based on $1.07 per cubic foot. That is submitted simply to prove the breach of the contract. The jury is entitled to take into account the amount of work actually performed and the amount of losses, as the Supreme Court said.

"Mr. Wait: We were not to pay according to the amount of work done. We were to pay according to the applications submitted and when the conditions were satisfactory, and if he did not make any application he could not have any recovery. The contract makes it a condition precedent.

"The Court: The objection is overruled.

500 "Mr. Wait: Note an exception.

"Q. (The last question is read to the witness.)

"Mr. Wait: The question is, can you?
"A. I can.

"Mr. Paine:

"Q. Will you tell the jury?
"A. 850 yards.
"Q. Cubic yards?
"A. Cubic yards.

"The Court: By what time was that? What was the question?

"Mr. Paine: Up to the time they stopped work. That is the amount of cubic yards of concrete poured by the company up to the time they stopped work.

"The Court: And that time was May 22d?

"Mr. Paine: No, they stopped work on March 9th. May 22d was the notice.

"Q. Will you reduce that to cubic feet, please?
"A. Twenty-two thousand nine hundred fifty.

"Q. What percentage of the total amount to be poured under your contract was that?

"A. About twenty-five per cent."

(S. M., pp. 283-5.)

77. The said Court erred in admitting evidence as to whether or not certain work and materials, charges and board bills, were in the witness's opinion "reasonably necessary for use on the job," or "reasonably necessary for the work on the building" or "reasonably necessary to use on the building" or " necessary for use on the building," over the objection and exception of defendant's counsel, as contained in the testimony and in the following questions and answers:

"Q. Were they (the materials used on the job) in your opinion reasonably necessary for use on the job?

"Mr. Wait: I object to that. That is for the jury to determine.

"Mr. Paine: I would like your Honor to make a note of that remark, that the reasonableness is for the jury.

"The Court: That seems to be one of the few points agreed on.

501 "Mr. Wait: Note an exception.

"A. They were."

(S. M., pp. 286-7.)

and the following question and answer:

"Q. In your opinion, were they reasonably necessary for the work on the building?

"A. Yes, sir; they were.

"Mr. Wait: The same objection and an exception."

and similar questions and answers with objections and exceptions noted.

(S. M., pp. 288, 289, 290, twice, 291, twice, 292, twice, 293, twice, 294 and 295-6.)

78. The said Court erred in admitting evidence of plaintiff's superintendent in Porto Rico, an interested witness and an officer of the plaintiff, who testified as to whether or not materials and labor for which disbursements were alleged to have been made were "reasonably necessary for your work on the Post Office building" and "were the prices paid reasonable?" as set forth in the following questions and answers:

"Q. Will you state the amount paid by you for labor at San Juan?

"A. In addition to my pay, I paid $11,379.21.

"Q. Now, can you give to the jury the total of the amounts you have just testified to that was actually paid out in cash in San Juan?

"A. I actually paid out $25,303.22.

"Q. Now I ask you again, in your opinion, were the materials purchased and the labor provided reasonably necessary for your work on the Post Office building? Were the prices paid reasonable?

"Mr. Wait: I object, if the Court please, that it is for the jury to determine. It *it* not a question for the witness, he is not qualified, and on the further ground that it is immaterial and not the proper measure of damages, and I make this objection apply to all this data, as I did when Mr. Converse gave it, as not being the proper measure of damages.

502 "The Court: The objection cannot date back. It will be good for the present question.

"Mr. Wait: I make it at this time.

"Mr. Paine: The only purpose of asking that question, if it is conceded that the question of reasonableness of the payments is for the jury, it seems to me it is only proper to have the testimony of the witness who is before us as to whether they were reasonable.

"The Court: The objection is overruled.

"Mr. Wait: Note an exception.

"Q. (The question is read to the witness.)

"A. They were."

(S. M., pp. 295-6.)

79. The said Court erred in admitting evidence of materials, machinery and tools left on hand, over the objection and exception of defendant's counsel, as a charge or counterclaim against the defendant on the ground that the same was not pleaded and was not evidence admissible to show a measure of damages for breach of contract as shown in the following questions and answers:

"Q. Now, Mr. Follett, after you finished your work down here, did the Guerini Stone Company have any materials, machinery or tools left on hand?

"Mr. Wait: I object to that as immaterial and not within the pleadings.

"Mr. Paine: I will show you a case where it says that the rule is the plaintiff's expenditure minus any materials which he may have on hand and plus any profits which he might have made.

"Mr. Wait: If he is merely showing it to give a credit to the defendants, I will not object to it, but if the purpose is to charge the defendants with this plant and materials, then I object to it as not being pleaded and not being within the pleadings.

"Mr. Paine: I want to show what became of it so that it cannot be credited to us.

"Mr. Wait: Then I object to it because failure to credit it or to account for it would be to charge us with it, and not having

503 been pleaded and there being nothing in the pleadings whatever about this material, it cannot be charged to the defendants.

"Mr. Paine: I propose to show that the defendant took it and has it.

"The Court: The objection is overruled.

"Mr. Wait: Note an exception.

"Q. (The question is read to the witness.)
"A. They did."
(S. M., pp. 296-7.)

80. The said Court erred in admitting evidence as disclosed by the following question and answer, over the objection and exception of defendant's counsel:

"Q. Now, I will show you an inventory. I show you a document entitled: Inventory of property taken over by P. J. Carlin Construction Company from Guerini Stone Company, San Juan, Porto Rico, August 3, 1912, signed: The P. J. Carlin Construction Company by John P. Carlin, Vice-President, and ask you to examine the items stated on that inventory and tell the jury whether at the time you left Porto Rico you were familiar with the articles contained in the inventory.

"Mr. Wait: That is, for him to verify or check it. I object to the form of the question and as being misleading to the jury. Being familiar with it isn't anything.
"The Court: The objection is overruled.
"Mr. Wait: Note an exception.

"A. These items all look familiar to me; yes, sir. We had those articles here."
(S. M., p. 298.)

81. The said Court erred in admitting evidence of fair and reasonable value of tools and materials charged by the plaintiff to the defendant, as shown by the following questions and answers:

"Mr. Paine:

"Q. Do you know the fair and reasonable value of those
504 materials in San Juan in June, 1912?
"A. I made my value at that time $3500.00.
"Q. As far as you know, were these articles ever returned to the Guerini Stone Company?
"A. As far as I know, they were not.

"Mr. Wait: I would like to renew my objection and move to strike out that price of $3500.00 on the same ground, that it is not within the pleadings and it is not material as far as the measure of damages is concerned.
"The Court: The motion is refused.
"Mr. Wait: Note an exception.

"Q. After August 6, 1912, do you know whether the value of these tools and materials was charged by the Guerini Stone Company to the P. J. Carlin Construction Company?

"Mr. Wait: Objected to as immaterial.
"The Court: The objection is overruled.
"Mr. Wait: Note an exception.

"A. They were.
"Q. And is there included as part of these materials the machinery, etc., which Mr. Converse testified were rented to the Guerini Stone Company by H. P. Converse & Company at the rate of fifteen dollars per day?

"Mr. Wait: Objected to as immaterial.
"Mr. Court: The objection is overruled.
"Mr. Wait: Note an exception.

"A. I don't understand.
"Q. Is it included in this list?

"Mr. Wait: The same objection and an exception.

"A. They were part of the tools, in that list at the rental price.
"Q. Were those tools included in this inventory?
"A. Yes, sir.

"Mr. Wait: The same objection and an exception."
(S. M., pp. 299-01.)

505 82. The said Court erred in admitting evidence over the objection and exception of defendant's counsel, as shown by the following:

"Q. Have you any explanation to make to the jury as to why it cost you $25,000 to do a quarter of the work?

"Mr. Wait: I object to that. It is purely a question for the jury. I haven't said anything in my cross-examination to bring out anything of that kind as to the cost. I have merely taken his figures that he gave. He said he didn't know anything about the profits.
"Mr. Paine: The object of this cross-examination was to attempt to convey the idea that if it cost $25,000 to do a quarter of our contract, that it would necessarily *would* have cost us under proper conditions more than the amount of our contract to do the work. I think that I am entitled to bring out that it was because of the conditions that we complained of, that it cost us more than it should have.
"The Court: The objection is overruled.
"Mr. Wait: Note an exception.

"Q. Answer just briefly.
"A. We had to do our work at such times as we could on account of the conditions of the building as furnished to us ready for our contract work. On work of this kind.

"Mr. Wait: I object to that, if the Court please, going into any academic question of work of this kind."
(S. M., pp. 306-7.)

83. The said Court erred in excluding the evidence of the statements and conversation by witness Berryman, a representative of

the Government architect, with respect to the work done by the plaintiff and his refusal to make estimates thereof, and of said representative of the Government's architect rejecting the work, including piers, as contained in the record as follows:

"Q. And what was one of the first things Mr. Berryman
506 did?

"A. He immediately took up our estimate and figured it and looked at it.

"Q. Did he have any conversation with you about it?

"A. Yes.

"Q. What did he say about it?

"Mr. Paine: I object to conversation between the Government inspector and this witness because it is not binding on us. The estimates of the Government superintendent are not binding in any case. We are entitled to payment on the terms provided in our contract.

"Mr. Wait: I will ask a preliminary question.

"Q. Mr. Oaksmith, did these estimates of Mr. Berryman include the work that the Guerini Stone Company had done?

"A. Yes, sir.

"Mr. Paine: That would not make any difference, your Honor. The Guerini Stone Company contract contained an entirely different measure of payment than the contract between the Carlin Construction Company and the Government and that has nothing at all to do with the proper amount to be paid under our contract.

"The Court: The objection is sustained.

"Mr. Wait: Note an exception.

"Q. Now, did Mr. Berryman refuse the estimates that you had theretofore made?

"Mr. Paine: The same objection, your Honor.

"Mr. Wait: If the Court please, the Court will appreciate that there are two things to an estimate, one is quantity and the other is the basis and the third thing is the satisfaction in the certificate or the estimate, and that and these estimates of the supervising architect or his representative were condition- precedent to the Guerini Stone Company receiving any money from the defendant. It was made so by the contract, and his estimate is very material to any payments being due to or owing to the Guerini Stone Company.

507 "Mr. Paine: There is nothing about that in the contract between the Carlin Construction Company and the Guerini Company. If he wants to show the estimates as any question of the amount due to the Carlin Company, I object to it because it is not binding on us.

"Mr. Wait: This is especially pertinent in view of Mr. Converse's testimony, in which he said that Mr. Carlin told him to make his estimate in the amounts that the Government inspector estimated,

and as Mr. Converse said then to put a certain other price, $1.07 I think he said, in his application, and the amounts and quantities that had been certified to by the Government inspector. Therefore what the Government inspector did is very material it seems to me in view of Mr. Converse's testimony alone.

"The Court: What the Government inspector did, if material, should be shown by the Government inspector. If the statement or certificate is material to this case, it should be shown by the inspector just as by any other witness.

"Q. Now, do you recall any directions or orders by the Government with respect to certain piers?

"A. Yes, I do.

"Q. What did Mr. Berryman say about these piers?

"Mr. Paine: I object to that. What he did may be material, but what he said is immaterial. I object to it as hearsay.

"Mr. Wait: He couldn't do it except with his mouth because all he could do was to give orders. Do you insist on your objection?

"Mr. Paine: Yes, indeed, the way to prove his orders is to have him prove them.

"The Court: The objection is sustained.

"Mr. Wait: Note an exception.

"Q. Did Mr. Berryman give you any written orders with respect to these piers that you remember?

"A. No, sir.

508 "Q. Did he give you any verbal orders?

"A. Yes, sir."

(S. M., pp. 375-8.)

84. The said Court erred in admitting evidence of the time spent in connection with doing work after the termination of the contract by the plaintiff on May 22, 1912, over the objection and exception of the defendant, on the grounds stated, as set forth in the following:

"Q. Now, Mr. Oaksmith, about these amounts which you claim to have spent in connection with the work covered by the Guerini Stone Company's contract; will you give us the periods during which these amounts were spent?

"A. Yes, sir. (The witness refers to his notes.) Wages from March 1, 1913, to June 27, 1914."

(S. M., p. 419.)

85. The said Court erred in permitting the following testimony over the objection and exception of the defendant:

"Q. Now, Mr. Converse testified that the total number of cubic yards of concrete covered by the Guerini contract was 3298 cubic yards. Would you say that that was correct?

"A. I can't say as to that.

"Q. Have you any idea at all? I want to get some where near, so we will have a basis to talk about. Haven't you any idea at all?

"A. How much did he say it was?
"Q. Three thousand two hundred ninety-eight cubic yards.
"A. I don't know.
"Q. Let me ask you this. Would you say that there were a thousand cubic yards or 20,000 cubic yards?
"A. No, I wouldn't say that there was as much as that.
"Q. Would you say that there was less than 10,000?
"A. Yes.
"Q. Would you say that there was less than 5,000?
"A. You have reference to the Guerini Stone Company's contract?
"Q. Yes.
"A. Yes, something less than 5,000.
"Q. Would it be less than 4,000? Then we would about
509 get to it.
"A. I should think it would be around that."
(S. M., pp. 423-4.)

86. The said Court erred in restricting and limiting the specifications issued by the United States Government for the performance of the contract between the parties and referred to in said contract, over the objection and exception of the defendant, as set forth in the record as follows:

"The Court: The specifications are admitted in the manner and the extent indicated in the Supreme Court's opinion.
"Mr. Wait: I think I will have to take an exception to that, Judge."
(S. M., p. 466.)

87. The said Court erred in excluding, over the objection and exception of the defendant, evidence of the method of arriving at an estimate, which estimate or voucher the witness had seen and conversed with the plaintiff about when defendant's counsel was endeavoring to show the method or manner by which the amount of the voucher was derived or obtained, and which was shown upon the voucher or estimate which the witness had seen, said estimate or voucher already being in evidence.
(S. M., pp. 490-1.)

88. The said Court erred in excluding, over the objection and exception of the defendant, evidence of the dissatisfaction of the defendant, which dissatisfaction, had been founded upon reports which it had received from the work from its own employees, and where it was one of the conditions precedent to the receiving of money by the plaintiff that it should do work to the satisfaction of the defendant and of the Government's architect, as follows:

"Q. What reports had you received which were reasons for your not expressing your satisfaction or being satisfied?

"Mr. Paine: I object to the contents of the reports; it seems to me that the only way—far be it from me to suggest, but if this is to be gone into it has got to be gone into as a claim of Mr. Carlin.

510 "The Court: The objection is sustained.
"Mr. Wait: Note an exception."
(S. M., p. 494.)

89. The said Court erred in excluding, over the objection and exception of the defendant, one letter of March 20, 1912, to the Supervising Architect from his representative upon the buildings, with respect to the conduct of the work by the plaintiff under the terms of the contract, which required the work to be done to the satisfaction of the defendant and of said architect, and which gave to the architect wide powers to determine questions pertaining to the work, its progress and its completion, which letter was marked Exhibit 17 for Identification.
(S. M., pp. 508-10.)

90. The said Court erred in excluding, over the objection and exception of defendant's counsel, a bona fide bid for the completion of the work described in plaintiff's contract after it had terminated its contract on May 22, 1912, on the ground that the said bid had not been accepted and acted upon, especially where the bid or estimate of plaintiff's President had been received in evidence as evidence of the cost of the work, and where estimates pure and simple had been received in proof of the probable cost to do and to complete work under the same contract, which said proposal or letter was marked Exhibit 18 for Identification.
(S. M., pp. 511-13.)

91. The said Court erred in excluding, over the objection and exception of the defendant, the ledger, journal and cash book of the defendant, upon the qualifications and foundations made and offered, where said books were used and offered merely to substantiate the disbursements made by the Secretary and Treasurer of the defendant company, and where such disbursements were chargeable to the plaintiff under the terms of the contract as

"the expenses incurred by the general contractors in finishing the work,"

and said expenses are described as those

511 "incurred by the general contractor, either for furnishing material or for finishing the work, or any damage incurred through such default"

by the plaintiff, as set forth in the record.
(S. M., p. 519-24.)

92. The said Court erred in excluding, over the objection and exception of the defendant, evidence of the defendant's expenses under the terms of its contract, as follows:

"Q. Mr. Carlin, while you were prosecuting this work down here, do you know the aggregate amount of money that you sent here to

this job, while the Guerini contract was being carried on, and what you paid out for materials?

"A. Yes, I know.

"Q. How much material did you send down here to Mr. Oaksmith, and expend for materials, for this work here of the Guerini Stone Company, and including the laying of the brick and the setting of the steel, and while that work was in progress what money did you disburse here or send here for disbursement?

Objection made by plaintiff was sustained, and exception taken by defendant.

(S. M., pp. 525-6.)

93. The said Court erred in refusing over the objection and exception of the defendant, to permit the recall of the witness Oaksmith, the defendant's bookkeeper on the contract job, because he had remained in the room about five minutes, gathering together his papers, and during the reception of testimony which had no bearing whatever upon that which it was explained would be offered and proven by the said witness Oaksmith, as set forth in the record.

(S. M., pp. 565-7.)

94. The said Court erred in excluding, over the objection and exception of defendant, the original contract between the defendant and Mr. A. Guerini for the completion of the contract which the
512 plaintiff terminated, the same being marked Exhibit 19, for Identification, as shown by the record.

(S. M., 575-6.)

95. The said Court erred in excluding, over the objection and exception of defendant, certain abstracts from the testimony of Mr. Lewis at a former trial of this action, in which the same matters were at issue, the said Lewis being out of the jurisdiction of the Court, and the said testimony having been oral testimony under oath at a former trial, as set forth in the record.

(S. M., pp. 583-8.)

96. The said Court erred in excluding, over the objection and exception of the defendant, the testimony of one of the witnesses transcribed by the official stenographer, as an exhibit and for the purpose of showing that there was no evidence in his testimony of any delay on the part of the defendant for any definite period of time or between any two dates or with respect to any definite matter, as set forth in the record.

(S. M., pp. 594-5.)

97. There is absolutely no evidence in the case of delays to plaintiff's work in the performance of its contract with the defendant for any specific time or period, and no evidence of the acts, neglect or failure on the part of the defendant to do or to perform anything, such as the failure to furnish labor or materials or a stable founda-

tion, that would cause delay to the plaintiff or give to plaintiff any justification for the termination of its contract.

98. There is not sufficient evidence in the case from which the jury could find that the defendant delayed the plaintiff, and this fact, was called to the attention of the Court in the motion to dismiss and, at the conclusion of the trial, in the requests to instruct the jury, and there is no evidence of any act, default or neglect on the part of the defendant that would warrant the jury in finding that plaintiff was justified in terminating its contract with the defendant.

99. The said Court erred in refusing to direct a dismissal of the complaint in the action below, upon the grounds stated in
513 defendant's motion for the dismissal of the action at the end of plaintiff's case.

100. The Court erred in overruling the defendant's additional motion that the general verdict be set aside and a new trial ordered.

101. The Court erred in refusing to make the following rulings in the matter of said additional motion for a new trial:

(1) That no verdict could be rendered for the recovery of the actual value of the work and materials reasonably and necessarily employed by the plaintiff in its work, less the value of any materials remaining in its possession and less any sums already received by it from the defendant.

(2) That the verdict is excessive and appears to have been given under influence of passion or prejudice.

(3) That the evidence adduced in the case at the trial on behalf of the plaintiff was wholly insufficient to justify the verdict of the jury, and that the said verdict is against the law, against the instructions given to the jury, against the evidence and against the weight of evidence.

CHARLES HARTZELL,
Attorney for Defendant-in-Error, San Juan, Porto Rico.

Read on Application for Writ of Error, August 21, 1916.

514 *Order Allowing Writ of Error.*

(Filed August 21, 1916.)

United States District Court, District of Porto Rico.

Law. 891-1912.

THE GUERINI STONE COMPANY, Plaintiff in Error,

vs.

P. J. CARLIN CONSTRUCTION COMPANY, Defendant in Error.

On this 21st day of August, 1916, came the plaintiff, by its attorney and filed herein and presented to the Court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it; praying also that a transcript of the record and

proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the First Circuit, and that such other and further proceedings may be had as may be proper in the premises.

In Consideration Whereof the Court does allow the writ of error, and upon the filing of a good and sufficient bond with surety to be approved by the Court in the sum of fifty-five thousand Dollars ($55,000) the same shall act as a supersedeas and cost bond.

[SEAL.] P. J. HAMILTON,
U. S. District Judge.

515 *Bond on Writ of Error.*

(Filed and Entered August 21, 1916.)

In the District Court of the United States for Porto Rico.

THE GUERINI STONE COMPANY, Plaintiff,

vs.

P. J. CARLIN CONSTRUCTION CO., Defendant.

Know all Men by These Presents that we, The P. J. Carlin Construction Company, as principal, and The Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the Guerini Stone Company in the full sum of Fifty-five Thousand Dollars ($55,000) to be paid to the said The Guerini Stone Company, its attorneys, executors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs and successors, jointly and severally firmly by these presents.

Sealed With Our Seals and dated this 21st day of August, 1916.

Whereas, lately, at a session of the District Court of the United States for the District of Porto Rico, in a suit pending in said Court, between the Guerini Stone Co., plaintiff and the P. J. Carlin Construction Company, defendant, final judgement was rendered against the said defendant, and the said P. J. Carlin Construction Company, defendant, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit and a citation directed to the said The Guerini Stone Co. is about to be issued, citing or admonishing it to be and appear at the United States Circuit Court of Appeals for the First Circuit, to be holden at Boston, Massachusetts;

516 Now the condition of the above obligation is such that, if the said P. J. Carlin Construction Co. shall prosecute this writ of error into effect and shall answer all damages and costs which may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

P. J. CARLIN CONSTRUCTION CO.,
By D. P. OAKSMITH, *Agent.*
FIDELITY & DEPOSIT CO. OF MD.,
By D. P. OAKSMITH, *Agent.*

[Seal of Fidelity & Deposit Co. of Md.]

FIDELITY & DEPOSIT CO. OF MD.,
By R. H. TODD, *Attorney in Fact.*

THE UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

Personally appeared before me this day, Joaquin M. Torres, known to me to be the party who signed the foregoing bond as the agent of the Fidelity and Deposit Co. of Md. and he acknowledged that he had executed the said bond on behalf of the said company for the uses and purposes therein set forth.

JOAQUIN M. TORRES.

In witness whereof I have hereunto set my hand and the seal of the District Court of the United States for Porto Rico, this 21st day of August, 1916.

ANTONIO AGUAYO,
Clerk Dist. Court U. S. for P. R.
By L. A. GROSS, *Dep. Clk.*

The foregoing bond is approved this 21st day of August, 1916.

P. J. HAMILTON, *Judge.*

517 *Citation on Writ of Error.*

UNITED STATES OF AMERICA,

The President of the United States, to the Guerini Stone Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit in the City of Boston, Massachusetts, on the *Twentieh day of October next, pursuant to a Writ of Error filed in the Clerk's Office of the † District Court of the United States for the District of Porto Rico wherein the P. J. Carlin Construction Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Peter J. Hamilton Judge of the District Court of the United States for the District of Porto Rico this 21st day of August, in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.]

P. J. HAMILTON,
District Judge.

*Not exceeding 60 days from the day of signing.
†Name of Court to which Writ of Error is directed.

Service of the foregoing citation and receipt of a copy of same is admitted at San Juan, P. R. this 23d day of August, 1916.

O. B. FRAZER,
Atty. for Plaintiff-Appellee.

518 *Order.*

(Filed August 23, 1916.)

In the District Court of the United States for Porto Rico.

THE GUERINI STONE COMPANY, Plaintiff and Defendant in Error,

vs.

THE P. J. CARLIN CONSTRUCTION CO., Defendant and Plaintiff in Error.

Now, on this day, upon motion of the defendant and plaintiff in error, and upon due cause shown to the satisfaction of the Court, the plaintiff in said case appearing, but neither consenting or objecting to the said application:

It is Ordered by the Court that the time fixed by the writ of error issued herein for the preparation and filing of the record in the above entitled cause in the Court of Appeals at Boston be, and the same is hereby extended for the period of thirty (30) days in addition to the time fixed in and by the said writ of error.

And it is Further Ordered by the Court that the said defendant is allowed the period of eighty-five (85) days from this date, within which to prepare and tender herein its bill of exceptions in the said cause.

San Juan, P. R., August 23, 1916.

[SEAL.] P. J. HAMILTON, *Judge.*

519 *Stipulation as to Exhibits.*

It is Stipulated and Agreed that any exhibits not printed or not printed in full herein may be used on the argument of any appeal herein with the same force and effect as if printed in this record.

Dated November 6, 1916.

EDWARD S. PAINE,
Solicitor for Plaintiff.
CHARLES HARTZELL,
Solicitor for Defendant.

Stipulation as to Record.

In the District Court of the United States for Porto Rico.

GUERINI STONE COMPANY, Plaintiff,

against

P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that the foregoing printed copy is a

true and correct transcript of record of the said District Court in the above entitled cause as agreed upon by the parties.

Dated, New York, November 6, 1916.

EDWARD S. PAINE,
Solicitor for Plaintiff,
CHARLES HARTZELL,
Solicitor for Defendant.

520 UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico, do hereby certify that the foregoing is a true copy of the transcript of record prepared by the parties, and filed, in the case of Guerini Stone Company v. P. J. Carlin Construction Company, as stipulated and agreed by and between the attorneys for the respective parties.

ANTONIO AGUAYO,
Clerk U. S. District Court for Porto Rico.

San Juan, P. R., November 15, 1916.

In the District Court of the United States for Porto Rico.

No. 891. Law.

GUERINI STONE COMPANY, Plaintiff,

v.

P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

Order.

[Filed in Circuit Court of Appeals December 5, 1916.]

In pursuance of a certain stipulation made and entered into on the sixth day of November, 1916, wherein and whereby it was stipulated and agreed by the attorneys for the respective parties in the above-entitled action that the printed copy of the transcript of the record in the said cause, including therein the bill of exceptions in said cause, was a true and correct transcript, now, by consent of the parties, the court does hereby approve of the said transcript, including the said bill of exceptions, and directs that a copy of this order be attached to the said transcript, as certified by the clerk of this court.

PETER J. HAMILTON, *Judge.*

San Juan, P. R., November 25, 1916.

521 UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, Antonio Aguayo, Clerk of the District Court of the United States for the District of Porto Rico, do hereby certify that the foregoing is

a true and correct copy of the Order in the above-entitled cause on file and of record in my office, under date of November 25, 1916.

Witness, my official signature and the seal of said court, at San Juan, in said district, this twenty-seventh day of November, A. D. 1916, and in the one hundred and forty-first year of the Independence of the United States of America.

[SEAL.] ANTONIO AGUAYO, *Clerk.*

Order.

Now, on this day, upon motion of the defendant, and upon due cause shown to the satisfaction of the court,

It is ordered by the court that the defendant herein is allowed the period of ten (10) days in addition to the eighty-five (85) days allowed in the order filed August 23, 1916, within which to prepare and tender herein its bill of exceptions in the said cause, viz., to and including November 27, 1916.

[SEAL.] P. J. HAMILTON, *Judge.*

San Juan, Porto Rico, November 16, 1916.

Attest:
A true copy:

[SEAL.] ANTONIO AGUAYO, *Clerk,*
By L. A. GROSS, *Deputy.*

522 United States Circuit Court of Appeals for the First Circuit,
October Term, 1916.

No. 1256.

P. J. CARLIN CONSTRUCTION COMPANY, Defendant, Plaintiff in Error,

v.

GUERINI STONE COMPANY, Plaintiff, Defendant in Error.

Order of Court.

December 5, 1916.

DODGE and ALDRICH, *JJ.:*

For good cause shown, It is ordered that the time for docketing this case and filing the record thereof with the clerk of this court be enlarged to, and including, Tuesday, December 5, 1916.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

523 United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1256.

P. J. CARLIN CONSTRUCTION COMPANY, Defendant, Plaintiff in Error,

v.

GUERINI STONE COMPANY, Plaintiff, Defendant in Error.

Error to the District Court of the United States for the District of Porto Rico.

Before Dodge, Bingham, and Aldrich, JJ.

Opinion of the Court.

April 2, 1917.

BINGHAM, *J.*:

This is a writ of error from a judgment, in favor of the Guerini Stone Company against the P. J. Carlin Construction Company, entered in the United States District Court for Porto Rico, in an action brought by the former against the latter to recover damages for an alleged breach of contract. The case has been twice tried before a jury and each time a verdict has been found in favor of the plaintiff. At the conclusion of the first trial the plaintiff, feeling aggrieved in the amount of the verdict, prosecuted a writ of error to the Supreme Court, and a new trial was granted. The opinion of the court is reported in 240 U. S. 264, where a general statement of the case will be found.

The grounds upon which the new trial was granted were: (1) That the obligations of the defendant under the eleventh paragraph
524 of the contract were unduly limited and practically annulled by the rulings of the trial judge; that it was error to read into the sub-contract, to which the plaintiff and defendant were parties, certain provisions contained in the general contract, between the defendant and the Government, and relieve the defendant from liability for damages due to delays resulting from "the action of the representatives of the Government in changing foundations" or "in suspending or stopping the work"; (2) that the ruling of the trial court—that "if there was delay in the furnishing of the granite, there could have been no liability under the sub-contract for such delay in money, but such a condition was to be remedied by an extension of time for completion as therein provided"—was error; that paragraph 11 of the sub-contract bound the "defendant to reimburse plaintiff for any loss caused by delay resulting from defendant's failure to provide labor and material not included in the sub-contract," and for loss caused by delay in providing granite and

foundations; that the extension of time provided for in paragraph 7 was inserted for the purpose of relieving the sub-contractor from "liability to liquidated damages imposed upon (him) * * * by paragraph 6 for failure to complete his work within the time therein limited," and could not "properly be construed to deprive him of his right under paragraph 11 to reimbursement for losses attributable to delays assumed by the general contractor"; and (3) that the court erred in excluding an "estimate of the total cost to plaintiff of the doing of the work called for in the subcontract," to the effect that it could be done for $53,012 and at a profit of $9700; that profits based on such testimony were not contingent and speculative, and that "no more definite or certain method of estimating profits could well be adopted than to deduct from the contract price the probable cost of furnishing the materials and doing the work." These were the grounds upon which the judgment was vacated.

The court, however, passed upon alleged errors assigned to the refusal of the trial judge to instruct the jury in accordance with two requests for rulings, as to both of which it held there was no error. The first of these requests was held to have been properly refused, on the ground that the evidence failed to show that the requisitions,
which the plaintiff was bound by the contract to submit be-
525 fore payments could be required, were based upon the cost of actual work erected or that a unit price had been agreed upon that "might be employed in making up the requisitions." And the other request was held to have been properly refused for the reason that its application had not been "confined to the case of the plaintiff being found entitled to recover upon the theory that the contract was rightfully terminated by the notice of May 22, 1912"; that other grounds of action were declared on to which the instruction would not be applicable.

In the concluding paragraph of the opinion, the court said:—

"Exceptions were taken to the refusal of certain other instructions requested by plaintiff with the object of basing a recovery of damages, including profits, upon the ground of plaintiff having been prevented by defendant's acts from performing its contract within the time specified or a reasonable extension thereof, or on the ground that defendant's refusal to make payments and other breaches of contract were so unreasonable and inexcusable as to indicate an inability or unwillingness on its part to carry out the contract or to amount to a refusal to perform it in the future, such as to justify plaintiff in stopping work. But these exceptions have not been fully argued, and the requests are perhaps wanting in accuracy; hence, we pass them without consideration."

It is apparent, therefore, that the Supreme Court did not pass upon the question whether the plaintiff was justified in declining to go on and complete the work under the contract, either because of the defendant's alleged failure to make payments as required by the contract, or because of the alleged prevention of performance of the contract by the plaintiff, within the time specified or a reasonable extension thereof, through delays attributable to the defendant.

The present writ of error is prosecuted by the defendant. Many

errors are assigned, but the only available ones relate to the admission or exclusion of evidence and to instructions which were given to the jury or refused.

The evidence discloses that, on the twenty-second day of May, 1912, the plaintiff wrote the defendant notifying it that it terminated the contract, would proceed no further with the work
526 and should hold defendant liable for damages for its breach.

One of the grounds on which the action proceeded was that the plaintiff had been prevented from performing its contract within the time agreed upon or a reasonable extension thereof, through defendant's delay in providing the foundations of the building, in furnishing the granite to erect the basement walls, and in stopping plaintiff's work on the 9th of March, 1912, until the foundations were underpinned; and that, because of this, the plaintiff was justified in declining to go on and complete its work under the contract.

As bearing upon this view of the case, the defendant requested the court to charge the jury that the plaintiff was not justified in terminating the contract because of delays. This request was refused and the defendant excepted. It is covered by assignment of error No. 41.

Whether these delays constituted a breach which would entitle the plaintiff to maintain an action for damages under paragraph 11 of the contract, provided it went on or held itself ready to go on and complete the work, or whether they constituted a breach which would justify the plaintiff in declining to go on and perform the balance of the work are, in view of the terms of the contract, quite different propositions. It is plain, as held by the Supreme Court, that under paragraph 11 of the contract the defendant would be liable to respond in damages for delays in the material progress of plaintiff's work attributable to defendant's failure to provide labor and materials, and to its failure to provide foundations and granite, if plaintiff completed or stood ready to complete its contract. But in view of the provisions of the contract, it does not follow that, if the plaintiff was delayed in completing its work within the three hundred days specified in paragraph 6, it could decline to go on and complete the same, for it appears by paragraph 7 that the time for completion was not limited to three hundred days from the date upon which the building was ready to receive its work and after it was notified to proceed, as delays of this character were not — be taken into consideration in making up the three hundred
527 days within which the plaintiff was required to perform the contract. In paragraph 7 it is provided:—

"Should the sub-contractor be obstructed or delayed in the prosecution or completion of the work by neglect, delay or default of the owner, the architect, the general contractors or of any other contractors employed by them upon the work, or by alterations which may be required in said work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the employees through no fault of the sub-contractor, then the time herein fixed for the completion of the work shall be

extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, etc."

This provision makes it clear that delays occasioned the plaintiff by the owner, the general contractor, or by alterations which might be required in the work were not to excuse the plaintiff from going on and completing the contract, but were to operate as an extension of the time or were not to be considered in computing the time within which, by the terms of the contract, the plaintiff was required to perform its work. Although the defendant was to be responsible to the plaintiff in damages for such delays, provided they interfered with the material progress of its work, we are, nevertheless, of the opinion that the plaintiff was not justified, in view of the provisions of paragraph 7, in declining, on this account, to go on and complete the contract; and that the jury would not be warranted in finding from the evidence that the plaintiff was prevented from completing the contract within the time specified. The court erred in refusing this request.

The same question is raised by defendant's exceptions to specific portions of the charge, as noted in defendant's assignments of error, Nos. 19, 20 and 28.

In assignments Nos. 79, 80 and 81, the defendant claims there was error in the admission of evidence tending to show that, at the time the plaintiff ceased work on the building, it had on hand and left upon the premises certain materials, machinery and tools of the value of $3,500, which the defendant took and appropriated to its own use. This evidence was admitted upon the question of damages, subject to defendant's exception. It also appears by plaintiff's
528 amended bill of particulars, filed November 9, 1912, that one of the items of damage sought to be recovered for breach of contract was the following: "Value of tools and machinery converted by defendant, $3,500."

The bill of complaint contains a paragraph alleging a right to recover on the ground of quantum meruit, but counsel for plaintiff states in his brief that this was entirely disregarded, and that the trial proceeded solely upon the ground of a breach of the special contract. He fails, however, either in brief or argument, to suggest any ground upon which the above evidence could have been received, and none occurs to us. The conclusion to be drawn from the evidence and the bill of particulars is that the defendant converted the materials, tools and machinery to its own use. If this is so, the evidence related to a matter entirely outside the contract, and could not properly be considered as an element of damage for its breach. The plaintiff's remedy to recover the value of these articles would seem to be an action of tort for conversion. The court erred in the admission of this evidence.

Upon the question whether defendant's failure to make payments, as called for by the contract, would justify the plaintiff in declining to go on with the contract the court charged the jury, as follows:

"If you find that the defendant failed to make payments, as called for by the contract, not over 85% and not [sic] otherwise in pursuance to the contract, on account of work done by the plaintiff in ac-

cordance with the terms of the contract, such failure constitutes a breach of contract on the part of the defendant, and justifies the plaintiff in stopping work under the contract, and entitled it to recover from the defendant for damages."

And refused the following requests:—

"The court instructs the jury that the delay of defendant to make payments on estimates, in the absence of a positive refusal to pay anything, was not ground for rescission or termination of the contract by plaintiff. The remedy of plaintiff was, and is, to recover interest on such deferred payments. Neither would such delay in making payments upon estimates be a cause for awarding any interest under the pleadings in the present action.

529 "The court instructs the jury that as a matter of law under the evidence adduced in this case, it must find the issues herein in favor of defendant upon the cause of action attempted to be set forth against defendant in the complaint filed by plaintiff."

To the instruction given and the refusals to instruct the defendant duly excepted, and the errors assigned are the twenty-ninth, forty-second and forty-third. Further exceptions were taken to the refusal of other requests bearing upon the same question, but we think the assignments above noted are sufficient.

In the letter of May 22, 1912, the plaintiff, in addition to notifying defendant that it declined to complete the contract because of the delays caused in the progress of the work, also declined on the ground that defendant had broken the contract through failure to make payments in accordance with its terms. It appears that on March 9, 1912, the plaintiff made a requisition for payment under the contract, in which it claimed there was due it:—

"Extra work to your order,		
Reconstructed piers		$300.00
Granite setting,		
3,460 ft. @ 40c. per sq. ft. surface,		
Amount of work completed to date		18,237.00
Cash received	3,765.80	
Amount 15% reserve	2,737.55	
Total		6,501.05
Amount of this application		11,735.95"

If it be assumed that this requisition was in compliance with the terms of the contract, the questions presented by the above assignments of error are: (1) whether the stipulation as to the time of payment of the instalments was a material obligation, the breach of which would go to the essence of the contract, and would justify the plaintiff in declining to go on with the work, or (2) if time of payment was not of the essence of the contract, whether there was evidence from which the jury could find that defendant failed to make payment under such circumstances as to indicate an intention to repudiate the contract, which fact, if found, would justify the

530 plaintiff in declining to complete the work under it. Wald's Pollock on Contracts (3d ed. Williston), pp. 347-349.

As to the first proposition it may be said that there is a difference of opinion in this country, if not in England. Williston on Sales, ss. 465-467, and cases cited; Wald's Pollock on Contracts (3d ed. Williston) pp. 329-332, and cases cited. While formerly the rule of the common law was that "time is always of the essence of the contract," this has been largely modified at the present day by the rule in equity which is to look at the whole scope of the transaction to see if the parties really intended that the time stipulated for should be of the essence (Wald's Pollock on Contracts, pp. 626, 627), and, guided by this rule, the English courts and our Supreme Court, in construing contracts between merchants, have held that stipulations as to time of shipment and delivery are material obligations, the breach of which go to the essence of the contract (Hoare v. Rennie, 5 H. & N., 197; Norrington v. Wright, 115 U. S. 188; Cleveland Rolling Mills Co. v. Rhodes, 121 U. S. 255); but with regard to payments under such contracts the English courts have held that a mere stipulation for time, without more, is not a material obligation, the breach of which would justify a refusal to deliver the balance of the merchandise contracted for. Mersey Co. v. Naylor, 9 App. Cases, 434. The Court of Appeals in the Sixth Circuit has reached the same conclusion. Cherry Valley Iron Works v. Florence Iron River Co., 64 Fed. 569; Monarch Cycle Mfg. Co. v. Roger Wheel Co., 105 Fed. 324. The case of Hull Coal & Coke Co. v. Empire Coal & Coke Co., 113 Fed. 256, 261, 262, in the Fourth Circuit, seems to have been decided upon the ground that the failure to pay as of the time agreed was, under the circumstances, a repudiation of the contract.

The particular phase of the question now under discussion has not been passed upon by the Supreme Court. The Court of Appeals for the Sixth Circuit, however, was of the opinion that the Supreme Court, in Norrington v. Wright, supra, had approved the English view as expressed in Mersey Co. v. Naylor, supra; and if it may fairly be said that this is so, and that, in contracts between mer-
531 chants, a stipulation as to time of payment, without more, would be held in England and in the Federal courts of this country not to be a material obligation, the breach of which would go to the essence and justify a refusal to perform on the other side, and that, to justify such a refusal, the circumstances must warrant the conclusion that the failure to pay amounted to a repudiation of the contract, the question is not concluded as to building contracts.

It remains, therefore, for us to consider whether the rule that obtains as to contracts between merchants should be applied to building contracts where the advance payments are not the equivalent and are not to be made in satisfaction of the work performed, as is the case ordinarily in mercantile contracts; or whether, in construing such contracts, we should go back of the mercantile rule to the reason out of which it arose, namely, the ascertainment of the parties' intention as expressed in the contract, viewed in the light of the subject-matter and the surrounding circumstances at the time it was made.

Two cases involving the interpretation of building contracts, where payments were to be made in instalments, have been called to our attention (Canal Co. v. Gordon, 23 U. S. 561 (see L. Ed.), and Phillips Co. v. Seymour, 91 U. S. 646), in which the Supreme Court held that the failure to pay an instalment or instalments justified the contractor in declining to complete his work under the contract. These cases, however, are not necessarily decisive authorities here, as the conclusion there reached may have been due to the fact that the circumstances, under which the failure to make payment took place, were such as to manifest an intention to repudiate the contract; for it appeared that the party called upon to make payment did not merely neglect to do so at the time called for in the contract, but was then known to be financially unable to make payment.

We are, therefore, remitted to the proposition of ascertaining the intention of the parties from the language of the contract, its subject-matter and the surrounding circumstances. This calls for the determination of a question of fact, but, as it involves the construction of a written contract, it is a question for the court.

532 In addition to stipulating for monthly payments in advance, the amount to be ascertained by taking 85 per cent of the cost of the work actually erected in the building, the defendant, in the closing paragraph of the contract, agreed as follows:

"And the said general contractors hereby promise and agree with the sub-contractor to employ, and do hereby employ him to provide the materials and to do the said [illegible] according to the terms and conditions herein contained and [illegible] to for the price aforesaid, and hereby contract to pay the same at the time, in the manner and upon the conditions above set forth."

It thus appears that the defendant, in addition to stipulating to make monthly payments in advance, further agreed to make them at the time, in the manner and upon the conditions set forth in the contract. Under these circumstances, it seems to us the parties must have intended that the agreement as to time of payment should be regarded as material, otherwise there could have been no reasonable occasion for the insertion of the above provision. We are also of the opinion that a building or construction contract like the one in question calling, as it does, for performing labor and furnishing materials over a long period of time, and invoking large expenditures, presents circumstances of such a nature as to indicate an intention that a stipulation as to time of payment should be material, and that its breach would go to the essence and justify the contractor in declining to complete the work. This is not only the legal construction of such a contract, but the result is equitable, due to the difference in circumstances attending partial performance of a building contract and a mercantile contract. The merchant who sells goods to be paid for in instalments can, upon furnishing an instalment of goods, maintain an action for the price (Brandt v. Lawrence, 1 Q. B. D. 344); whereas the contractor cannot without going on to perform his contract or holding himself in readiness

to do so. Langdell's Summary of the Law of Contracts, p. 143, s. 128; Williston on Sales, s. 466.

The discussion of the question of payments thus far has been upon the assumption that the plaintiff's requisitions were properly made out, and stated the amount which it was entitled to demand
533 and defendant was legally bound to pay. Is such an assumption warranted from the terms of the contract and the evidence? The contract, in the twelfth paragraph, required the defendant to pay the plaintiff for the "work and materials"—which it was to perform and furnish under paragraph 1 of the contract—the sum of $64,750, "such sum" to be paid "in current funds by the general contractors to the sub-contractor in monthly payments on account, not to exceed in amount 85 per cent of the cost of the work actually erected in the building, provided that the sub-contractor furnishes to the general contractors a written requisition, on a form to be supplied by the general contractors, not less than twelve days before payment is required." Paragraph 1 states the work and materials which plaintiff was to furnish for the $64,750, as follows:

"To furnish and set in position, including the concrete backing all the imitation of said stone, and to construct the interior concrete walls, concrete floors, concrete roof, backing the granite construction, enclosing all the I beams, * * * including all labor and materials incident thereto."

It will be seen that the monthly payments which were to be made in advance were for the concrete work and were to come out of the $64,750, and had no relation to the sum to be paid for setting the granite. There is no provision in the contract that the plaintiff should be paid monthly for setting the granite. Paragraph 25 does not state when the granite work was to be paid for, and, in the absence of an express agreement, the inference is it was to be when that work was completed. In the requisitions of December 30, 1911, and March 9, 1912, which are the only requisitions put in evidence, the plaintiff demanded payment for the granite work in advance of its completion. In that of December 30, 1911, there was a demand for erecting granite of $989.20, and in the one of March 9, 1912, of $1,384. These sums, according to the contract, were not properly included in the amounts called for in the requisitions, and we fail to see how defendant could be found in default and guilty of a breach of contract justifying the plaintiff in declining to go on and complete its work, unless it was
534 otherwise mutually agreed that advance payments for setting granite might be had and included in the requisitions, or unless defendant waived its right to object to their inclusion.

At the time the requisition of December 30, 1911, was made, it is not claimed and there is no evidence to show that the unit price of $1.07 per cubic foot had been agreed upon as a basis for ascertaining the amount to be paid; and no testimony was offered showing the amount or cost of the work actually erected at that time.

As to the requisition of March 9, 1912, testimony was offered by the plaintiff, subject to defendant's exception, that in February,

1912, the parties agreed upon a unit basis of $1.07 per cubic foot and that the concrete work called for in this requisition amounted to 15,471 cubic feet, and, figured on the basis of $1.07 per cubic foot, came to $16,553.78. The assignments of error here relied upon are 59 and 60. There was no evidence that the amount called for in this requisition was based on the actual cost of the work erected in the building as required by paragraph 12 of the contract.

In the bill of complaint, Article 9, the plaintiff alleges that, in making its requisitions, it thereby duly notified and demanded of the defendant payment, in accordance with the terms of the contract, of the sums due for work actually performed. It is evident that the testimony above referred to does not support this allegation, and that plaintiff attempted to prove, not that the requisitions had been made to conform to paragraph 12 of the contract, but that paragraph 12 had been modified by mutual agreement by the addition of a unit price for determining the cost and amount to be paid. To authorize the admission of this testimony plaintiff should have amended its complaint and alleged the modification of the contract, if a modification had been agreed to.

The position is taken by the defendant that the plaintiff, in its letter of May 22, 1912, terminated and rescinded the contract, and was thereby precluded from maintaining an action upon the special contract. In the letter the plaintiff states it terminates the contract, but it is apparent, from the rest of the language used, that the word "terminate" was intended simply to convey the idea that the
535 plaintiff declined to go on and complete the work, for it also says that it will hold the defendant responsible in damages for breach of the contract. Anvil Mining Co. v. Humble, 153 U. S. 540, 551-52. Wald's Pollock on Contracts (3d ed. Williston), pp. 351, 352.

On the question of damages the court instructed the jury, as follows.

"If you find that he [plaintiff] was justified in terminating the contract, as he did on May 22, upon the principles above given you, you can consider the reasonable expenditures incurred by the plaintiff, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which the plaintiff could have made if allowed to complete the work under the contract. So the different items that you may, if you come to the question, take into account are the outlays less the material on hand, the amount of work actually performed and the profits, if you find there were any which were not speculative. The measure of profits is the contract price less what is shown to you as the expense of carrying out the contract, if that is shown to your satisfaction."

To this the defendant excepted, and it is made the subject of the thirtieth assignment of error.

This part of the charge was given at the plaintiff's request. The court had previously instructed the jury, as to the elements of damage which it might consider in making up its verdict, in accordance with the rule as laid down in United States v. Behan, 110 U. S., 338,

where the court said that in such a case a plaintiff might recover, "first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract." The plaintiff was entitled to recover, if at all, the reasonable expenditures incurred in the performance of the contract (less payments made and materials on hand), and, if it suffered damages due to material delays in the progress of the work, which had not been included in the expenditures and were attributable to the defendant, then such damage should be added; also the profits that it would have realized from performing the contract. The trouble with the instruction
536 is that it embodies a duplication of elements and is misleading. It is unnecessary to consider the matter further.

When the case was set for hearing in the Court of Appeals, counsel for plaintiff had not prepared his brief, and, under the rule of the court, was permitted to argue his case after having procured the consent of counsel for the defendant. Since then he has filed a brief in which he contends that no bill of exceptions is before the court. This position is based upon the ground that the bill of exceptions was not signed by the judge before whom the case was tried. It appears that a transcript of the record, embodying the bill of exceptions, was prepared and agreed to as a true record by counsel for the respective parties, and was presented for the approval and signature of the trial judge within the time provided for so doing; that thereupon he approved the transcript, including the bill of exceptions, and drafted an order stating the facts, which he signed and directed should be attached to the transcript. This having been done, court and counsel evidently regarded the bill of exceptions as signed. In this we are inclined to believe they were right, that the plaintiff's objection is to the form rather than the substance of what took place, and that to sustain it would only work injustice. The objection, however, seems to have been obviated, as the bill of exceptions, which was seasonably presented for approval and signature, has since been signed.

We think we have considered all the questions necessary to a correct understanding of the case or that will be of aid upon a new trial.

The judgment of the United States District Court for Porto Rico is reversed, the verdict is set aside, the case is remanded to that court for further proceedings not inconsistent with this opinion; and the plaintiff in error recovers its costs.

537 On January 23 and 24, A. D. 1917, this cause came on to be heard, and was fully heard by the court, Honorable Frederic Dodge and Honorable George H. Bingham, Circuit Judges, and Honorable Edgar Aldrich, District Judge, sitting.

"Thereafter, to wit, on February 27, A. D. 1917, the following Order was filed by leave of court:—

Order of District Court.

[Filed in Circuit Court of Appeals February 27, 1917.]

Now, on this day, the above-entitled cause coming before the court, upon the application of the above-named defendant, by its attorney, Charles Hartzell, requesting the court to formally sign and approve the bill of exceptions heretofore filed in this court and agreed to by stipulation signed by the attorneys for both parties to said action, and the court having considered the said application, does agree to and grant the same; and thereupon the court endorses upon the original bill of exceptions filed in this court in said cause the following:—

"The foregoing bill of exceptions is hereby allowed, approved and signed by the court, as of November 25, 1916.

"P. J. HAMILTON, *Judge.*"

And it is further, on the application of said defendant, now ordered that an alias writ of error and citation in the said cause, and conditioned according to law, be issued as of this date.

I, Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico, do hereby certify that the foregoing is a true, complete and correct transcript of a certain order of court and journal entry made and entered in the record of said court in the above-entitled cause, on the twenty-first day of February, 1917.

It witness whereof, I have hereunto set my hand and the seal of said court, at San Juan, Porto Rico, this twenty-first day of February, 1917.

[SEAL.] ANTONIO AGUAYO, *Clerk.*

538 Thereafter, to wit, on the second day of April, A. D. 1917, the Opinion of the Court (page 523) was announced, and the following judgment was entered:—

Judgment.

April 2, 1917.

This cause came on to be heard January 23 and 24, 1917, upon the transcript of record of the District Court of the United States for the District of Porto Rico, and was argued by counsel.

On consideration whereof, It is now, to wit. April 2, 1917, here ordered, adjudged and decreed as follows: The judgment of the

United States District Court for Porto Rico is reversed, the verdict is set aside, the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; and the plaintiff in error recovers its costs.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on April 27, A. D. 1917, the following Motion to Extend Time was filed by the defendant in error:—

Motion to Extend Time.

[Filed April 27, 1917.]

Now comes the defendant in error, and moves that the time for filing a petition for a rehearing be extended to and including Saturday, the twelfth of May, 1917.

By Its Attorney, CHARLES F. CHOATE, JR.

On the same day, to wit, April 27, 1917, the following Order of Court was entered:—

Order of Court.

April 27, 1917.

Upon motion by defendant in error the time for filing a petition for rehearing is extended to and including Saturday, May 12, 1917.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

539 *Clerk's Certificate.*

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 538, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including May 31, 1917, in the cause in said court, numbered and entitled, No. 1256, P. J. Carlin Construction Company, Defendant, Plaintiff in Error, v. Guerini Stone Company, Plaintiff, Defendant in Error.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this thirty-first day of May, A. D. 1917.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

540 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which P. J. Carlin Construction Company is plaintiff in error, and Guerini Stone Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for Porto Rico, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that yo send without
541 delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the tenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified transcript of record herein on file in the office of the Clerk of the Supreme Court of the United States in the matter of Guerini Stone Company, petitioner, for a writ of certiorari against P. J. Carlin Construction Company, respondent, and there numbered 557 of October Term, 1917, upon the docket of said court, may be taken as a return by this court to the writ of certiorari issued by the Supreme Court of the United States in the said case."

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit hereto set my hand and affix the seal of said court at Boston, in said First Circuit, this sixth day of November, A. D. 1917.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

542 United States Circuit Court of Appeals for the First Circuit.

No. 1256.

P. J. CARLIN CONSTRUCTION COMPANY, Defendant, Plaintiff in Error,

v.

GUERINI STONE COMPANY, Plaintiff, Defendant in Error.

Stipulation.

(Filed November 6, 1917.)

In the above entitled action, It is hereby stipulated that the certified transcript of record herein on file in the office of the Clerk of the Supreme Court of the United States in the matter of Guerini Stone Company, petitioner, for a writ of certiorari against P. J. Carlin Construction Company, respondent, and there numbered 557 of October Term, 1917, upon the docket of said court, may be taken as a return by this court to the writ of certiorari issued by the Supreme Court of the United States in the said case.

CHARLES HARTZELL,
Attorney for P. J. Carlin Construction Co.
EDWARD S. PAINE,
Attorney for Guerini Stone Company.

Dated, New York, October 30, 1917.

A true copy:
Attest:

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

543 [Endorsed:] File No. 26,024. Supreme Court of the United States, October Term, 1917. No. 557. Guerini Stone Company vs. P. J. Carlin Construction Company. Writ of Certiorari.

544 [Endorsed:] File No. 26,024. Supreme Court U. S., October Term, 1917. Term No. 557. Guerini Stone Co., Petitioner, vs. P. J. Carlin Construction Co. Writ of certiorari and return. Filed November 8, 1917.

-10-

NOV 2 1918
JAMES D. MAHER,
CLERK

No. 218

Supreme Court of the United States

OCTOBER TERM 1917.

GUERINI STONE COMPANY,

Petitioner,

against

P. J. CARLIN CONSTRUCTION COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITIONER'S REPLY BRIEF.

EDWARD S. PAINE,
Attorney for Petitioner.

EDWARD S. PAINE,
EUGENE CONGLETON,
of Counsel.

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Supreme Court of the United States

GUERINI STONE COMPANY,
Petitioner,
against
P. J. CARLIN CONSTRUCTION COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF.

This reply brief is made necessary owing to the fact that the defendant (the respondent) has filed a brief of two hundred and fifty-one pages in which he seeks to sustain the judgment of the Circuit Court of Appeals upon many grounds not specified in the opinion of that court. In our main brief we have only discussed the points upon which the Circuit Court of Appeals reversed the judgment and directed a new trial. In this brief we shall discuss the other questions raised in the defendant's brief.

Defendant's Specifications of Error.

The defendant with his writ of error to the Circuit Court of Appeals filed one hundred and one assignments of error. Most of these assignments of error are specified in some form or other in the specifications of error set forth at pages 14 to 59 of its brief in this Court.

Many of the assignments of error and many of the specifications of error are not founded upon any exception appearing in the record. Many of the other specifications of error are founded upon exceptions which under well established rules of Federal procedure are not available in an Appellate Court.

The defendant argues at length that the Court erred in denying its motion to dismiss at the close of the plaintiff's case, failing to take into account that such a motion is waived when the defendant elects to go on with the case and put in its own testimony as the defendant did here (page 163).

McCabe & Steen Co. vs. Wilson, 209 U. S., 275;
Accident Insurance Co. vs. Crandal, 120 U. S., 527, 530;
Robertson vs. Perkins, 129 U. S., 233, 236;
Campbell vs. Haverhill, 155 U. S., 610;
Union Pacific R. R. Co. vs. Daniels, 152 U. S., 684;
Northern Pacific R. R. Co. vs. Mares, 123 U. S., 710.

The defendant assigned as error, and specifies as error in his brief at pages 42 and 43, the denial by the Trial Judge of a motion for a new trial. As has been repeatedly held by the decisions of this Court, the denial of such a motion is discretionary with the Trial Court and raises no question in an Appellate Court on writ of error.

Moore vs. *The United States*, 150 U. S., 57;
Crumpton vs. *The United States*, 138 U. S., 361, 365;

Wilson vs. *Everett*, 139 U. S., 616, 621;
Van Stone vs. *Stillwell & Bierce Manufacturing Co.*, 142 U. S., 128, 134;
Blitz vs. *The United States*, 153 U. S, 308;
Wheeler vs. *The United States*, 159 U. S., 523.

Many more of the defendant's specifications of error rest upon a general exception to the instructions given by the Court at the request of the plaintiff (page 277) and to a general exception taken to the refusal of the Court to charge such of the twenty-nine instructions requested by the defendant which the Court refused to give (page 277).

It is well established by the decisions of this Court that an exception taken to a series of instructions is of no avail in a Federal Appellate Court unless the instructions as a whole are erroneous; and similarly, that a general exception taken to the refusal of the Court to give a series of instructions is not available unless all the instructions should have been given.

Bogk vs. *Gassert*, 149 U. S., 17.
Union Pacific Railway Co. vs. *Callaghan*, 161 U. S., 91, 95;
Newport News & Mississippi Valley Co. vs. *Pace*, 158 U. S., 36;
Holloway vs. *Dunham*, 170 U. S., 615.

An inspection of the instructions requested by the plaintiff (pp. 257-269) with the notation by the Court as to which were given and which were refused, shows that many of the instructions given by the Court were proper beyond any question, and

in fact the eighth and ninth instructions requested by the plaintiff (page 259) are so obviously correct that the defendant has not questioned their accuracy in this Court or in the Court below. It, therefore, follows that the defendant's general exception (page 277) to the instructions of the Court, given at the request of the plaintiff, is of no avail.

Similarly, the refusal of the Trial Court to charge the defendant's sixth requested instruction (pp. 261, 277) is so obviously correct as to render unavailable the defendant's general exception to the refusal of the Court to charge all the propositions requested by him under the rule above stated. The defendant's sixth requested instruction was expressly contrary to the law laid down in the decision of this Court on the former writ of error (240 U. S., page 280).

Much emphasis is laid by the defendant throughout its brief upon the phraseology employed by the Court in its charge and to alleged contradictions in the charge. No specific objection was taken at the trial to any part of the charge as being misleading or as being contradictory so that the Trial Court might, if it had so desired, have corrected the charge in the respects criticized by the defendant. Such criticism as is indulged in by the defendant of the Court's charge as misleading or contradictory is, therefore, not available to the defendant in this Court nor was it available in the Court below.

McDermott vs. *Severe*, 202 U. S., 600, 611;
Dotson vs. *Milliken*, 209 U. S., 237, 242;
Chicago Great Western R. Co. vs. *McCormick*, 200 Fed., 375;
Beiseker vs. *Moore*, 174 Fed., 368;

Louisville & N. R. Co. vs. *McClish,* 115 Fed., 268.

The defendant also contends that it was error for the court to submit to the jury the question whether the plaintiff had the right to terminate the contract because of the delay. The defendant's counsel in his brief with some inconsistency urges that from inferences which he draws from the testimony the delay was a reasonable delay in view of the surrounding circumstances. Inasmuch as there was conflicting evidence as to some of these surrounding circumstances it would seem that the action of the court in leaving the question to the jury was entirely proper, but in any event no exception was taken to the action of the court in leaving this question to the jury (277-278) so that the defendant's contention was not open in the court below and is not open in this court.

THE ELABORATE ARGUMENT ON THE FACTS SET FORTH AT PAGES 60 TO 159 OF THE DEFENDANT'S BRIEF IS NOT IN ANY SENSE A FAIR PRESENTATION OF THE EVIDENCE AND IS DIRECTED TO SHOWING THAT THE VERDICT IS AGAINST THE WEIGHT OF EVIDENCE,—A QUESTION WHICH WILL NOT BE DETERMINED IN THIS COURT.

Nearly one hundred pages of the defendant's brief are devoted to argument on the facts. Much of this argument is directed to attempting to show that this Court should undertake the functions of the jury and arrive at a conclusion different from

that reached by the jury. Inasmuch as we apprehend that it is well settled by the decisions of this Court that it will not interefere with the general verdict of a jury on conflicting evidence, we shall not attempt within the compass of this brief to enter upon a discussion of facts as bearing upon the weight of the evidence or the credibility of the witnesses.

We have set forth on pages 3 to 14 of our main brief a statement of facts which we believe the Court will find amply justified by the record and in accord with the statement of facts set forth in the opinion of this Court when the case was here on the former writ of error. We shall not attempt to point out all the misstatements of fact and unwarranted conclusions from the facts contained in the defendant's brief, but in order to throw light upon the defendant's treatment of the subject, we shall point out some of the more glaring instances of the defendant's distortion of facts.

At page 70 of the defendant's brief appears the following statement:

> "Now in all the testimony there is nowhere any direction to stop the work or to delay the work; and the defendant had no directions to stop the work until April 1, 1912."

On page 199 of the record defendant's witness was asked on cross examination the following question:

> "Q. Now, you don't mean to take the position that you never told the Guerini Stone Company to stop work about that time, do you?

A. What date is that?
Q. This is March 12, 1912."

Thereupon defendant's counsel himself admitted on the record that the witness notified plaintiff on March 13, 1912 (page 199).

On page 76 the defendant states that "Mr. Guerini went to Porto Rico, not on account of the Federal Building and Post Office alone, but to establish himself at San Juan as an artificial stone artist and contractor, and that was what he did and that from February, 1911, to February, 1912, he did custom work in and about San Juan that had no connection with the contract between the parties." The fact is that Mr. Guerini went to Porto Rico pursuant to the instructions of the defendant (page 64, Plaintiff's Exhibit 7, page 282) in the early part of 1911; that owing to the fact that the foundations had not been completed, he was obliged to wait around until he could start work; that he made certain imitation stone work for one or two outside jobs and that the defendant was credited with the amount which he received for outside work (pages 131 to 133, Plaintiff's amended Bill of Particulars, page 17, Credit item "Cash for outside work, $710.")

It seems fair to ask that if Mr. Guerini was the inefficient artisan and disagreeable and untrustworthy and unreliable person pictured at pages 82 to 87 of the defendant's brief, why was he employed by the defendant to complete part of the work on the Federal Building for the defendant after the plaintiff had terminated its contract (Defendant's Exhibit QQ, page 330; page 194)?

In his brief defendant's counsel attempts to give the Court the impression that Mr. Converse, in

testifying that a unit for the concrete work was agreed on at an interview with Mr. Carlin on February 1st or 2nd, was coloring his testimony in view of the observations in the opinion of this court to the effect that the contract itself made no specific provision for a unit price for the concrete work (brief, pages 96-97; 151). Defendant's counsel attempted to give the same impression to the jury at the trial (page 112). Thereupon counsel for the plaintiff produced the record of Mr. Converse's testimony at the first trial—before the case came to this court—and showed that Mr. Converse had testified to exactly the same effect at the first trial. Thereupon defendant's counsel withdrew entirely from his position and apologized (page 134).

> "Mr. Paine: You will remember that Mr. Wait conducted this line of examination yesterday on cross examination. He asked Mr. Converse if he had not read the decision of the Supreme Court in this case and he said he had and he asked if the decision did not emphasize the fact that the agreement as to units was of importance and he then asked him if it was not the result of his reading that decision—if in effect he did not think up this testimony after reading that decision.
>
> "Mr. Wait: No, I deny that. I asked him if he didn't think that it was necessary to prove that in order to premise any breach. That question was ruled out by your Honor, and I agreed then that if I was mistaken, we would correct it this morning. I make the admission with an apology because I had not read his testimony. I read it this morning and I now make the admission."

In spite of this admission and this apology on the record, defendant's counsel now seeks to create exactly the same impression in the mind of this Court.

Instances might be multiplied where other glaring misstatements of fact are made in the defendant's brief, but we have recited the instances above as being typical representations of the unfairness of the defendant's statements of fact.

On pages 116 to 119 of the defendant's brief, the impression is sought to be conveyed that the settlement of the foundations was due to no fault or omission on the part of the defendant, but was due to "some neglect or default on the part of the Government in not making proper soundings or adopting other means to locate said fortress wall."

On the first trial the question as to who was responsible for the defects in the foundations was litigated and the defendant introduced evidence tending to show that the defect in the foundations was attributable to the defendant. This Court, in its decision 240 U. S., page 278, in effect held that the defendant had assumed an absolute obligation to furnish a proper foundation and that whether or not the foundation was defective through the fault of the defendant was immaterial.

The question of the relative responsibility of the defendant and the Government for the sinking of the foundation was, therefor, not litigated on the second trial, for it appears on page 177 that the defendant's counsel made the following statement:

> "I have no intention of asking the Court or the jury to determine anything about the responsibility between the defendant and the Government,"

thereby acquiescing in plaintiff's counsel's contention (page 177) that this Court had established as a matter of law that the question of the defendant's responsibility or the Government's responsibility did not affect the defendant's absolute obligation to provide labor and materials in such manner as not to delay the material progress of the work.

The defendant's contention that the Government and not itself was responsible for the defective foundation is evidently intended to give atmosphere to aid the construction of the contract contended for by the defendant in an attempt to persuade this Court to alter its former decision.

The defendant, on page 130 of his brief, takes the extraordinary position that the plaintiff was in default in the performance of its contract because it failed to proceed with the work in accordance with the defendant's letter of April 3, 1912 (Defendant's Exhibit P, page 317).

It may be that at the time this letter was written the defendant actually believed that "all of the work outlined by the Government engineers will require about two months to completely finish" and that "the entire south wall and the entire east walls, however, will be completely ready for your work in not more than two weeks and the only delay will be on the north wall." But the undisputed testimony shows that on May 22, when the plaintiff terminated the contract, it was then estimated that it would be five months before the plaintiff could do any work on the building and it turned out to be seven or eight months (page 27).

It was not contended by the defendant at the trial that work could have been commenced before November, 1912 (page 27), and even if the defend-

ant honestly believed on April 3rd that work could be commenced in about two weeks and that "all of the work outlined by the Government engineers will require about two months to completely finish," it was quite mistaken in that belief.

It is, perhaps, a test of the defendant's good faith that a notice based upon such an apparent misapprehension of fact should be seriously advanced as having the effect of putting the plaintiff in default for not proceeding in two weeks to place the concrete upon foundations which were sinking and were not ready to receive the plaintiff's concrete work until seven months after the notice was given.

POINT I.

The failure to make progress payments was a sufficient breach of the contract to entitle the plaintiff to refuse further performance and to sue for a breach.

Although failure of one party to make an instalment payment under a contract for the sale of goods is not necessarily such a breach as to entitle the other party to refuse further performance and sue for damages, it is the rule of general application and is undoubtedly the rule in the Federal Courts that a failure to make a progress payment for labor and materials furnished under a construction contract, gives the contractor or sub-contractor, to whom payment is denied, a right to suspend performance and sue for a breach. This is so because of the peculiar nature of construction con-

tracts. The contractor puts his labor and materials upon another's land and cannot take it away. Construction operations are often vast and a construction contractor would not undertake the work if he were obliged to finance the whole operation until the entire construction was completed. The courts recognizing this, have treated the provisions of construction contracts for progress payments as dependent conditions entitling the contractor to abandon work and sue for a breach when the payments are not made.

Williston's Wald's Pollock on Contracts, in his treatment of dependent and independent promises, at page 332 states:

> "Non-payment of an instalment under a building contract or similar contract justifies cessation of work,"

citing the following cases:

Phillips vs. *Seymour,* 91 U. S., 646;
Cox vs. *McLaughlin,* 54 Cal., 605;
Dobbins vs. *Higgins,* 78 Ill., 440;
Keeler vs. *Clifford,* 165 Ill., 544;
Geary vs. *Bangs,* 37 Ill. App., 301;
Schulte vs. *Hennessy,* 40 Iowa, 352;
McCullough vs. *Baker,* 47 Mo., 401;
Bean vs. *Miller,* 69 Mo., 384;
Mugan vs. *Regan,* 48 Mo. App., 461;
Graf vs. *Self,* 109 N. Y., 369;
Thomas vs. *Stewart,* 132 N. Y., 580;
Miller vs. *Sullivan* (Tex. Civ. App.), 33 S. W. Rep., 695;

Bennett vs. *Shaughnessy*, 6 Utah, 273;
Preble vs. *Bottom*, 27 Vt., 249.

In the case at bar there was something more than a mere neglect or delay in making payment. There is evidence in the record from which the jury were amply justified in finding that the failure to make payment constituted an out and out refusal to pay what was due. The only exception to the Court's charge on the question of the effect of the defendant's failure to make payments (page 277) was to the following instruction of the Court:

> "On the other hand, if the payments were not properly made that may amount, if it was a substantiated (substantial) default in payment, to breaking the contract. A contract like this is not made for the fun or honor of putting up a building. That is not it. A contractor does certain work in order to secure certain money, just like everybody else does who does certain work in order to get certain pay. And if there is a substantial failure, amounting substantially to the withholding of the whole payment, not necessarily the whole payment, but the bulk of the payment, a man is not bound to go on with the contract under those conditions."

This instruction of the Court brings the case within the decisions of *Canal* vs. *Gordon*, 73 U. S., 561, and *Phillips Co.* vs. *Seymour*, 91 U. S., 646, even if their application be limited, as contended by counsel for defendant in his brief. That they are not so limited is shown by the following decisions of the Federal Courts.

Mullin et al. vs. *United States*, 109 Fed., 817 (C. C. A., 2nd Circuit). A contractor gave a bond for the benefit of material-men, conditioned on prompt payment. A corporation contracted to furnish him material, eighty per cent. of that put in place to be paid for the first of each month, the remaining twenty per cent. to be paid for on completion of the work. The contractor failed to make the progress payments and it was held that the contractor's bondsman was liable to the corporation furnishing labor and material under the contract which it had refused further to perform, and had elected to treat as broken, not only for the eighty per cent., but also for the remaining twenty per cent. and that the bondsman was liable not only for the eighty per cent. progress payments, but also for the twenty per cent. which was, under the terms of the contract, reserved until completion. The Court said at page 819:

> "The Circuit Court seems to have been quite right in holding that the certificates showing the amount of labor and materials for which eighty per cent. was due, showed equally well the amount for which the remaining twenty per cent. would become due, which would be 'upon the final completion and acceptance of the work' which had not elapsed when this suit was brought. Payment when due is prompt payment; and by the terms of the contract, none of the twenty per cent. would have become due for labor and materials supplied under the contract if it had been fulfilled by the contractor and there would have been no breach of the bond as to this.

But there had been successive failures to make payment of the eighty per cent. according to the contract, and the prosecutor appears to have thrown it up for these failures, and to have claimed that the 20 per cent. on all the certificates thereby became due. There is no provision in the contract that any failure to pay should make any installments due that were not otherwise due, but the provisions for furnishing the labor and materials and for payment of the 80 per cent. are reciprocal, and such failure would of itself be such a breach by the contractor as to justify the contractor in refusing to proceed under it, and treating it as rescinded, which was done. Then there was no provision left postponing the payment of the 20 per cent. and that became due with the rest. *Construction* Co. vs. *Seymour*, 91 U. S., 646."

McElwee vs. *Bridgeport Land & Improvement Co.*, 54 Fed., 627. The plaintiff entered into a contract with the defendant to build and equip a cotton mill. The contract provided for the payment of certain sums as the work progressed. The plaintiff began work on the contract and received the first progress payment of $5,000, but failing to receive the second progress payment, stopped work and sued for the second payment. The Court held that the plaintiff was entitled to sue for breach of contract and to recover for the work he had already done, together with prospective profits.

Michigan Yacht & Power Co. vs. *Busch*, 143 Fed., 929 (C. C. A., 6th Circuit). The defendant con-

tracted to build a launch for the plaintiff. The plaintiff defaulted in making instalment payments and refused to make any further payment until certain securities to which he was not entitled under the contract, were furnished him. It was held that the failure to make instalment payments was a breach of the contract which entitled the defendant to offset damages for the breach in a suit by the plaintiff to recover the amount paid under the contract.

POINT II.

The defendant's contention that the plaintiff did not sufficiently show that its work was done to the satisfaction of the defendant or the Government Architect is without merit.

The defendant's counsel argues in his brief that plaintiff gave no proof establishing that it had done the work to the satisfaction of the architect or of the defendant.

The defendant made no point of proof as to satisfaction at the trial.

The court charged the jury, without exception, that the plaintiff must have done the work to the reasonable satisfaction of the defendant before it was entitled to payments under the contract (Record, pages 371-372), and left the question as to whether or not there was proof of such satisfaction in the case with the jury (Record, page 372). No exception was taken by defendant's counsel to the action of the court in leaving the question of satisfaction to the jury (Record, pages 377-379).

The evidence shows that the work was done under the immediate supervision of the Government's architect and of the defendant's agent in Porto Rico. At the time the work was progressing no fault was found with the work done. Specific complaint was made with regard to piers which needed re-enforcement, and new piers were built. On page 244 of the Record, the defendant's witness, Joseph P. Carlin, testified that the plaintiff had not cleaned and pointed the granite work and had not surfaced the concrete work. This was the only evidence of dissatisfaction which the defendant gave, besides a general statement that the work had not been done entirely to the satisfaction of the witness (page 214-215).

The weight which the jury gave to the defendant's contention that the work was not done to its satisfaction may be inferred from the testimony of this witness. Obviously in constructing a concrete building, a part of the basement walls of which were of granite, while concrete was being poured in back of and above the granite the granite would not be cleaned and pointed until the concrete work had been finished. Nor would the surfacing and smoothing of the exposed concrete in the basement go forward until protection was afforded from the spattering of other concrete erected above. These objections were obviously so frivolous as to justify the jury in believing that there was not honest dissatisfaction of the defendant with the work.

The defendant's witness Oaksmith, who was in charge of the work for some time before work was stopped on March 9th, and in a position to point out any defects which might have existed in the work apparently was unable to do so.

The same objection which the defendant is seeking to raise here was made in *MaNeil* vs. *Armstrong,* 81 Fed., 943. The court, in disposing of the point, said:

> "We do not find any error here. The testimony shows that the work was done under the inspection of the owner and his agents, no material defects being pointed out or objections made during its progress. Such slight defects as appeared have been corrected, or allowance has been made for them."

There was ample evidence in the case from which the jury could find that the work had been done to the satisfaction of the defendant. Numerous letters written by the defendant to the plaintiff during the progress of the work were introduced in evidence, and none of them made any mention of any defects in the performance that were not remedied. Similarly, numerous conversations between the representatives of the parties, covering the whole period of the work, were testified to, in which no mention was made of any dissatisfaction with the work. Under the decision in *MaNeil* vs. *Armstrong* (*supra*), therefore, there was enough evidence to support a verdict that the work was done to the satisfaction of the defendant and the architect.

But the question of the manner of performance of the contract by the plaintiff was not even in issue. The plaintiff's complaint (Paragraph IX) alleges:

> "That plaintiff has well and properly performed under the terms of said contract a

large amount of work, and has done all of said work which defendant has permitted it to do or that could be done at the stage of construction reached by the defendant in the work done by it."

This allegation is nowhere controverted in the defendant's answer (Record, pages 12-15). An allegation that work is well and properly performed under the terms of the contract necessarily implies that the work was done to the satisfaction of the defendant and the Government's architect, when reasonable satisfaction amounts to performance.

POINT III.

The plaintiff did not rescind the contract. It treated the contract as broken by the defendant and sued for its damages and recovered on this basis.

The definite step taken by the defendant was on May 22nd when it wrote to the plaintiff the letter in evidence as Plaintiff's Exhibit 25, pages 291-292, the last paragraph of which letter is as follows:

"Under these circumstances and owing to your entire failure to comply with the terms of the contract, we hereby notify you that we now terminate the contract and shall proceed no further with the work, and that we shall hold you liable for the damages we have sustained by reason of your breach of the contract, including your failure to provide labor and materials not included in the contract with

> us in such manner as not to delay the material progress of our work and your failure to make payment in accordance with the terms of your contract, and all other breaches of contract on your part."

This letter states the purpose of the plaintiff to hold the defendant "liable for the damages we have sustained by reason of your breach of contract." This language in the letter is inconsistent with any idea of rescission. It is only consistent with the idea of the plaintiff treating the contract as broken and suing for a breach.

The plaintiff's action in treating the contract as ended and claiming and suing for damages caused by the breach is supported by numerous authorities in the federal courts.

In *Lovell* vs. *St. Louis Mutual Life Insurance Co.*, 111 U. S., 264, at p. 274, this court, in stating the remedies for breach of contract, said:

> "Where one party to an executory contract prevents the performance of it, or puts it out his own power to perform it, the other party may regard it as *terminated* and demand whatever damage he has sustained thereby. We had occasion to examine this subject in the recent case of *United States* vs. *Behan*, 110 U. S., 339, to which we refer. It is unnecessary to discuss it further here." (Italics ours.)

Again *Anvil Mining Co.* vs. *Humble*, 153 U. S., 540, is a leading case in this court to the same effect.

United States vs. *Behan*, 110 U. S., 338, is also a leading case on remedies as well as on measure of

damages. In stating remedies for breach of a contract, this court said, p. 345:

> "When a party injured by the stoppage of a contract *elects* to rescind it, then, it is true, he cannot recover any *damages for a breach of the contract,* either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit.* There is then no question of losses or profits. But when he *elects* to go for *damages for the breach of the contract,* the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services * * *." (Italics ours.)

In *Michigan Yacht & Power Co.* vs. *Busch,* 143 Fed., 929 (C. C. A., 6th Circuit), the plaintiff refused to make payments required by the contract. The defendant treated the contract as broken and interposed a counterclaim for damages caused by the breach. The court said, p. 934:

> "The refusal to go on and finish the boat under such circumstances would not constitute a technical rescission of the contract, but, as stated in *Anvil Mining Co.* vs. *Humble,* 153 U. S., 540, 552, 14 Sup. Ct., 876, 38 L. Ed., 814, by Justice Brewer, would be 'merely an acceptance of the situation which the wrongdoing of the other party has brought about.' To the same effect is our own case of *Cherry Valley Co.* vs. *Florence Iron Co.,* 64 Fed., 569, 573; 12 C. C. A., 306."

Cherry Valley Iron Works vs. *Florence Iron River Co.*, 64 Fed., 569. This case cites with approval and follows the case of *Lumber Co.* vs. *Bates*, 31 Mich., 158, where it was held that where the plaintiff refused to further perform a contract because of the defendant's alleged breach, and notified the defendant that it would look to him "for our damages sustained by your failure to perform the contract according to its terms," *the demand of damages in the notice* wherein the plaintiff elected to treat the contract as broken *prevented the defendant for treating the contract as rescinded,* but only gave him the right to sue for damages caused by the breach.

That is precisely the case here. The plaintiff's election was made on May 22, 1912, when the aforesaid letter was written. By notifying the defendant that it would hold it for all damages sustained by reason of the breach of contract it could not recover on any theory of rescission, but only for breach of contract. That was the theory on which the case was tried and submitted to the jury and upon which the jury found in favor of the plaintiff.

Plaintiff's rights were of course fixed by the position it took on May 22, 1912, and the complaint as originally filed sought to take advantage of both theories, namely termination and suit for damages and also the rescission and *quantum meruit*. The rescission theory was, however, promptly abandoned and paragraph 10 of the complaint amended by an amended complaint filed November 2, 1912, p. 18. At the trial plaintiff announced that its theory was not *quantum meruit* but damages for contract breach; the case

was tried on the latter theory and no evidence to sustain a recovery on the basis of a *quantum meruit* was introduced.

POINT IV.

The defendant's contention that the plaintiff waived the breaches of contract, by defendant, after March 12, 1912, is wholly without merit.

This is a contention which is made for the first time on appeal. No point was made on the trial that the plaintiff waived the breach of contract due to the instability of the foundations or due to the failure to make progress payments after March 9, 1912. No error is assigned in the record relating to any ruling of the court with regard to any waiver of the defendant's breaches of contract after March 9, 1912. Indeed, no question of waiver could have been raised in the trial court, because waiver of the breach of contract had not been pleaded by defendant (Record, pp. 12-15).

Moreover, the question of waiver is always a question of fact (*Pence* vs. *Langdon*, 99 U. S. 578, 581). The defendant not having asked that the question of waiver by the plaintiff after March 9, 1912, be submitted to the jury, cannot ask the court to pass upon the facts which it claims constituted waiver. As a matter of fact there never was any waiver or intention to waive on the part of the plaintiff.

The breach of contract, both as to the foundations and as to payments, was a continuing breach. It was not definitely known on March 9th just how serious the situation with the foundations

was. Apparently the investigations as to the cause of settlement of the foundations and the remedy, if any, were not completed until four or five weeks after the suspension of work on March 9th, for Mr. Follett, in answer to a question as to when work had been started in repairing the foundations, said (Record, p. 27):

> "I can't tell when it started, probably about four or five weeks after the suspension, after the investigations were made."

The executive officers of the plaintiff were in Boston, and Mr. Follett, the agent, was in Porto Rico. It was therefore impossible for the officers of the plaintiff to be apprised of the situation with regard to the foundations until after they were acquainted with all the facts and were able to form an intelligent judgment as to how much delay would ensue, obtaining their information from their agent in Porto Rico. As a matter of fact the defendant informed the plaintiff in writing under date of April 3, 1912 (Deft's Ex. P; Record, p. 317), that the work of repair would require about two months to completely finish, and that the entire south and east walls would be ready for the plaintiff's work in not more than two weeks, and the only delay would be on the north wall. In this the defendant was either endeavoring to mislead plaintiff or was wholly unacquainted with the situation, for the repairs were not made so that the plaintiff could have continued the work until November, 1912 (Record, p. 27).

All the inferences from the testimony and the correspondence of the parties show that the plaintiff after acquiring knowledge of the facts as to

delay never waived, or indicated any intention of waiving, the defendant's breach of the contract. On April 25, 1912, within a reasonable time after the plaintiff had found that the defendant's statement in its letter of April 3rd (Record, p. 317) that work might be resumed within two weeks was erroneous, the plaintiff wrote to the defendant (Pltff's. Ex. 24; Record, pp. 290-291), stating:

> "We can now only proceed with the contract on the basis that the damages be now adjusted, so that we can proceed with our work on a new and fresh start."

After waiting a reasonable time for the defendant to make what the plaintiff considered a proper adjustment, the plaintiff wrote the letter of May 22, 1912, notifying the defendant of its election to treat the contract as broken and to sue for damages.

It is therefore very apparent that the defendant's claim of waiver, not having been submitted to the trial court, cannot be considered by this court, and that even if it had been submitted to the jury, the jury must have found the fact in favor of the plaintiff.

POINT V.

The Court's instructions to the jury as to interest were proper, but no sufficient exception was taken to review the question in this Court.

The court instructed the jury as follows (p. 275):

"In case you find that the defendant broke its contract with the plaintiff and find a verdict for the plaintiff, you may allow the plaintiff interest at the rate of six per cent. per annum from the date of defendant's breach of the contract up to today upon that portion of plaintiff's damages which were at the time of the breach capable of being definitely ascertained by computation."

The court did not instruct that the jury must allow interest but left it to the jury to say whether interest should be allowed or not.

The court's instruction quoted above as to allowance of interest was not excepted to in such manner as to save a question for review.

The only exception taken to the court's charge as to interest was the general exception taken to all the instructions of the court given at the instance of the plaintiff. As pointed out on page 3 of this brief, such a general exception is not sufficient to save a question for review.

In *Lincoln* vs. *Claflin*, 7 Wall., 132, a general exception was taken to the charge of the court which included a charge that the jury must allow interest if they found for the plaintiff. The court held that the general exception was not sufficient to raise a question for review.

Southern Pacific Co. vs. *Arnett*, 126 Fed., 75. The court charged that the jury must allow interest if they found for the plaintiff. An exception was taken to the charge "as to the measure of damages." No exception was taken to the allow-

ance of interest, nor was the attention of the court in any way called to the question of law relating to it. The court said, p. 80:

> "Counsel for the defendant by their silence waived any objection to the charge upon this ground, and the error in this respect is not here for our consideration. It was indispensable to the presentation of it to this court that a specific exception should have been taken which clearly pointed out to the trial court the error into which it had fallen, and thus sharply called its attention to the question of law which counsel now seek to present."

In *Mobile & Montgomery R. Co.* vs. *Jurey*, 111 U. S., 584, it was contended that the court's charge that interest should be allowed was erroneous. The court said, p. 596:

> "Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions, first, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be 8%. It is not disputed that the first proposition was correct, but the exception to the charge was general. It was, therefore, ineffectual. It should have pointed out to the court the precise part of the charge that was objected to."

The verdict of the jury shows that no allowance was made for prospective profits but that the verdict was based upon the plaintiff's proof of money laid out or obligations incurred in performing the contract with the defendant.

The rule is well established in the Federal Courts that in cases of contract or tort, the jury may allow interest as damages, although the interest allowed would not be a matter of strict right.

In *Lincoln* vs. *Claflin*, 7 *Wall.*, 132 at p. 139, which was an action against two defendants for fraudulently obtaining the property of the plaintiff, the court said:

> "Interest is not allowable as a matter of law, except in cases of contract, for the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury."

This case has often been cited and followed in the Federal Courts as sustaining the general proposition that even though the damages be unliquidated, the jury may allow interest in its discretion.

In *Redfield* vs. *Ystalyfera Iron Co.*, 110 U. S., 174, the court in considering the question of interest, said, p. 176:

> "Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied by the nature of the promise, it becomes part of the debt and is recoverable as of right; but where

it is given as damages, it is often a matter of discretion."

This quotation was cited with approval by the United States Supreme Court in the later case of *Redfield* vs. *Bartels*, 139 U. S., 701.

In *The Scotland*, 118 U. S., 507, the United States Supreme Court, considering the question of interest, said, p. 518:

> "The allowance of interest on damages, is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury."

District of Columbia vs. *Robinson*, 180 U. S., 92. It was claimed that the question of interest in this case was a question of law for the court and should not have been submitted to the jury. The suit was a suit for trespass in entering on land and digging up and removing a quantity of gravel to be used for repairing and constructing public highways. Interest was included in the verdict of the jury. The court said, p. 108:

> "It was the plaintiff's right to have invoked the exercise of the discretion of the jury, and the circumstances of the case were to be considered by it in exercising such discretion and presumably were considered."

District of Columbia vs. *Camden Iron Works*, 181 U. S., 453.

This was a suit for breach of contract. The contract was broken by the District of Columbia and the plaintiff sued to recover the contract price of materials which it had furnished in so far as the contract had been performed. The court left the questions of interest to the jury. The court held that the submission of the question to the jury was proper.

These decisions of this court establish that except where interest is a matter of express contract or is implied by the nature of the promise and thus becomes a part of the debt, interest is recoverable in the discretion of the jury even if the damages are unliquidated, and such decisions have been followed and applied to cases similar to the one at bar.

In *Nashua & Lowell Railroad Corporation* vs. *Boston & Lowell Railroad Corporation,* 61 Fed., 237 (C. C. A. First Circuit), Judge Putnam in his opinion examined the question as to the allowance of interest in cases in the Federal Courts with care, reviewing many of the authorities. The court said, pp. 246-247:

> "There was no agreement for payment of interest, therefore, if allowed, it must be in the way of damages for delay, or, as it is frequently described, as moratory interest. It is needless to attempt to follow or analyze the numerous state decisions touching the question of moratory interest, certainly not without tracing out the history of the peculiarities of the rules on this topic in the particular states, the decisions of whose courts may be cited. There has been, in the main, a steady advance of the state of the law from a disposi-

tion to allow no interest, through the stages of considering it as a matter of discretion for either the court or the jury, towards a rule or legal right."

Judge Putnam then cites the various cases in this court in which it was held that whether or not interest will be allowed as damages, was a question in the discretion of the jury.

Portland Co. vs. *Searle,* 169 Fed., 968 (Cir. Court, District Maine), was a case very similar to the case at bar. The court (Judge Hale) followed the rule of damages in the Behan case and added interest from the time of breach of the contract to the time of trial.

Occidental Consolidated Mining Co. vs. *Comstock Tunnel Co.,* 125 Fed., 244. The suit was brought for breach of contract. The damages were unliquidated. The issue was submitted to the jury with instructions that they might include interest in their verdict. A motion was made for a new trial and among the grounds specified was the charge of the court permitting the jury to include interest in its verdict. The court denied the motion for a new trial and upon the question of the instructions as to interest, said, p. 245:

"It may be that it would have been erroneous for the court to have instructed the jury that, in the event of finding a verdict for the plaintiff, interest should be added to the amount the plaintiff had expended; but I am not prepared to say that the jury, in the exercise of its discretion, had no right to consider the question of interest in assessing the dam-

ages. *Lincoln* vs. *Claflin,* 7 Wall., 132, 139, 19 L. Ed., 106."

The cases cited by the defendant in the federal courts that interest will not be allowed on prospective profits are all equity suits for infringing patents. It was decided by the United States Supreme Court in *Mowry* vs. *Whitney,* 14 Wall., 620, 653, that in the federal courts in equity interest on prospective profits would not be allowed. This rule has since been adhered to in patent cases, but has never been adopted by the United States Supreme Court in actions at law. In other than patent cases interest is allowed in equity on unliquidated damages (*Pennsylvania Steel Co.* vs. *New York City Ry. Co.,* 198 Fed., 721). But, as pointed out above, no prospective profits or interest in prospective profits were allowed by the jury on prospective profits.

Furthermore the charge of the court on the question of interest excluded the possibility of allowing interest on profits. The court confined interest to such portion of plaintiff's damages "as were at the time of the breach capable of *being definitely ascertained by computation.*" Prospective profits are of course in the nature of unliquidated damages and so were clearly not included in the court's instructions.

It is true that the Circuit Court of Appeals for the Second Circuit has held that interest in a suit on contract where the damages are unliquidated, will not be allowed. The court follows the rule as to interest laid down by the Court of Appeals, of the State of New York. This is shown by the case

of *Stevens* vs. *Phoenix Bridge Co.,* 139 Fed., 248, where the court said, p. 250:

> "In the absence of controlling decisions in the Federal courts, we are disposed to adopt as guides, in determining when interest should or should not be allowed, the rules deducible from the decisions in New York, where the question in all its phases has been so frequently and so fully discussed."

This decision has been somewhat weakened by the later case of *Pennsylvania Steel Co.* vs. *New York City Railway Company,* 198 Fed., 778, where in connection with the allowance of interest on an unliquidated claim, the court said, pp. 779-780:

> "It is objected that no interest should be allowed upon the claim in the equity suit, because it was unliquidated. We follow in this circuit the rulings of the Court of Appeals of New York, allowing no interest on unliquidated claims. *Stevens* vs. *Phoenix Bridge Co.,* 139 Fed., 248, 71 C. C. A., 374. In equity, however, interest, especially in a case of wrongful diversion like this, is a matter of discretion (*Lillianthal* vs. *Cartwright,* 173 Fed., 580, 97 C. C. A., 530), and we are unwilling to interfere with that discretion as exercised by the court below."

It will be seen that the Circuit Court of Appeals for the Second Circuit in its own words follows the rulings of the Court of Appeals of New York which are apparently at variance with the general

rules adopted by the Supreme Court of the United States and the Federal courts of the other circuits.

On the other hand the Circuit Court of Appeals for the Eighth Circuit has held that even in cases of unliquidated claims for damages, arising on contract, interest is allowed as a matter of right.

Southern Pacific Co. vs. *Arnett,* 126 Fed., 75. Arnett shipped certain cattle on the defendant's railroad, and by reason of the negligence of the defendant some of the cattle were lost. The jury in its verdict included interest. The Railroad Company assigned the allowance of interest as error. The court said, p. 80:

> "It is contended that the court below erred in that it instructed the jury to add to the amount of damages which they found interest thereon from November 3, 1898, and the authorities are cited in which it is held that the question whether or not interest upon damages for a tort should be allowed is for the jury and not for the court. *Lincoln* vs. *Claflin,* 7 Wall., 132, 139, 19 L. Ed., 106; *Lesser Cotton Co.* vs. *St. Louis, I. M. & S. Ry. Co.,* 52 C. C. A., 95, 102, 105; 114 Fed. 133, 140, 143. But this was an action for the breach of a contract to transport live stock over the railroad of the defendant with reasonable care. Nothing less than the actual amount of the loss and interest thereon from the time it was demanded will fully compensate the shipper for the breach of the agreement, and he is entitled to full compensation. The general rule is that the plaintiff is entitled to interest upon the damages which he sustains from a breach of a contract, and this case falls fairly within

that rule. There was no error in the charge of the court to the jury to allow interest upon the damages."

Missouri, Kansas & Texas Ry. Co. vs. *Truskett,* 104 Fed., 728. This was a suit against the Railroad Company to recover damages for injury to cattle through the negligence of the carrier. The court said, p. 732:

> "In an action against a common carrier for failure to transport property in accordance with its contract, the general rule is to allow as damages the value of the property, with interest upon such value from the time when it should have been delivered, if it is not delivered at all. *Railroad Co.* vs. *Estill,* 147 U. S., 599, 622, 13 Sup. Ct., 444, 37 L. Ed., 292, and cases there cited. When the property is delivered by the carrier, but a loss has ensued to the shipper from a failure to deliver it within a reasonable time, no reason is perceived why interest on the amount of the loss may not also be allowed from the time compensation for the loss is demanded. In actions of pure tort, which do not sound in contract, as where the property of a third party is destroyed or injured through the negligence of a carrier, the usual practice is, as this court said in *Eddy* vs. *Lafayette,* 4 U. S. App., 247, 252, 1 C. C. A., 441, 49 Fed., 807, to leave the allowance of interest on the damages which may be assessed to the sound discretion of the jury. But, as the case at bar is founded upon a breach of contract, it may well be distinguished from the case last cited."

We believe that the rule of interest indicated by the great weight of authority in the Federal Courts is more consonant with justice than the arbitrary rules laid down by the New York Court of Appeals and followed by the Circuit Court of Appeals of the Second Circuit. In the present case the plaintiff disbursed large sums of money five years ago. It was prompt in bringing suit for damages, and it would be a hardship to refuse interest on the amount from which it has been unlawfully deprived.

In any case, the rendering of a verdict by a jury including interest, even though interest be allowed under improper instructions from the court, is not a ground for the reversal of the judgment. The court will order the judgment to be affirmed if the interest be remitted, otherwise to be reversed. (*Washington & Georgetown R. R. Co.* vs. *Harmon*, 147 U. S., 571).

POINT VI.

The agreement for setting the granite did not constitute a separable contract.

The case was tried on the theory that the provisions of the contract for erecting concrete and for setting granite were entire. No point was made on the trial that the provisions for erecting concrete and for setting granite were separable, and in fact counsel for the defendant proceeded at the trial upon the theory that the contract was entire, for he requested the Trial Court to charge the jury that the plaintiff by undertaking the setting of the granite waived prior delays or damage in con-

nection with the performance of the concrete work. No error was assigned to any ruling of the trial court based on the theory that the contract was entire, but error was assigned to the refusal of the Trial Court to hold that the performance by the plaintiff of the work of setting granite operated as a waiver of prior delays (page 348).

The contract was entire because the performance of the concrete work and the granite work by the plaintiff was inextricably intermingled. The plaintiff while setting the granite was also engaged in backing up the granite with concrete work. It was practically impossible to apportion the amount of cost of doing the different kinds of work when they were being proceeded with concurrently, and after the plaintiff had undertaken to set the granite, which was necessary to lay a proper foundation for the superimposed concrete work, could it be said that if it had failed to set any granite at all that it could still hold the defendant to the part of the contract providing for the erection of the concrete? We think not.

These considerations, we believe, establish that after the plaintiff had undertaken to set granite, the performance of that work was inseparable from the whole contract. This was so obvious that the case was tried by both counsel and by the Court on that theory.

Respectfully submitted,

EDWARD S. PAINE,
Attorney for Petitioner.

EDWARD S. PAINE,
EUGENE CONGLETON,
Of Counsel.

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Notice of Motion.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1917.

GUERINI STONE COMPANY,
Petitioner,

against

P. J. CARLIN CONSTRUCTION COMPANY,
Respondent.

SIRS:

PLEASE TAKE NOTICE that upon a certified copy of the transcript of the record herein and upon the annexed petition of Guerini Stone Company, sworn to on the 28th day of June, 1917, I shall make the motion hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on the 1st day of October, 1917, at the opening of court on that day or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dated, New York, June 22d, 1917.

Yours, &c.,

EDWARD S. PAINE,
Attorney for Guerini Stone Company,
Petitioner,
62 Cedar Street,
New York, New York.

To:

JOHN C. WAIT, ESQ.,
CHARLES HARTZELL, ESQ.,
Attorneys for P. J. Carlin
Construction Company,
Respondent.

Motion.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1917.

GUERINI STONE COMPANY,
Petitioner,

against

P. J. CARLIN CONSTRUCTION COMPANY,
Respondent.

Now comes the Petitioner herein, Guerini Stone Company, by Edward S. Paine, Esq., its attorney, and moves this honorable Court upon a certified copy of the transcript of the record herein and upon the annexed petition, sworn to on the 28th day of June, 1917, for a writ of certiorari directed to the Circuit Court of Appeals for the First Circuit, to bring before this honorable Court the case of Guerini Stone Company, plaintiff, against P. J. Carlin Construction Company, defendant, recently decided by the Circuit Court of Appeals for the First Circuit for such proceedings therein as to this court may seem just and for such other and further relief in the premises as may be just.

EDWARD S. PAINE,
Attorney for Petitioner,
62 Cedar Street,
New York, New York.

Petition for Writ of Certiorari.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1917.

GUERINI STONE COMPANY,
Petitioner,

against

P. J. CARLIN CONSTRUCTION COMPANY,
Respondent.

To the Honorable the Supreme Court of the United States:

Your Petitioner, Guerini Stone Company, respectfully shows:

FIRST: This is a suit at law for damages for breach of contract. The complaint was filed in the District Court of the United States for Porto Rico on the 18th day of June, 1912. The case was tried before a jury which rendered a verdict on the 16th day of November, 1912, in favor of the plaintiff—the Petitioner herein—in the sum of Six thousand six hundred nine and 25/100 (6,609.25) Dollars. Being dissatisfied with the amount of the verdict, the plaintiff, under the appellate procedure in force at that time, sued out a writ of error to this Court. Reversal was sought on the ground that because of erroneous rulings on the part of the Trial Judge, the plaintiff's recovery was unduly limited. The judgment was reversed by this Court in an opinion written by Mr. Justice Pitney, which is printed in

240 U. S. 264. The case hinged on the construction of certain clauses in a written contract. This Court, in a well-weighed opinion covering nineteen printed pages, quoted and considered all of these clauses and construed them and the contract very fully. The case was remanded with instructions that it be tried anew in accordance with the opinion. Your Petitioner submits that at the second trial, as appears fully from the record, the law of the case as established by this Court in the express language of the opinion and its proper and necessary intendments, was conscientiously and correctly applied by the Trial Judge. On the second trial the jury rendered a verdict in favor of the plaintiff in the sum of Forty-four thousand four hundred eighty-two and 63/100 (44,482.63) Dollars.

SECOND: The defendant thereupon sued out a writ of error to the Circuit Court of Appeals for the First Circuit, appellate jurisdiction over the District Court of the United States for Porto Rico having been conferred upon that court in the meantime. The Circuit Court of Appeals thereupon considered and construed the identical clauses of the contract which had been before this Court and came to conclusions which are directly contrary to the plain purport of the opinion of this Court. Thereupon the Circuit Court of Appeals reversed the judgment and remanded the case anew to the District Court of the United States for Porto Rico for proceedings not inconsistent with the opinion.

THIRD: Basing its conclusion on the last paragraph of the opinion of this Court, the Circuit Court of Appeals took the position that this Court had not construed the contract on two points which were fundamental to plaintiff's right to recover for breach of contract, namely, whether the plaintiff

was justified in declining to go on and complete the work under the contract, either because of the defendant's failure to make payments as required by the contract or because of the prevention of performance of the contract within the time specified or a reasonable extension thereof through delays attributable to the defendant. The Circuit Court of Appeals then proceeded to hold that a proper construction of the contract did not permit plaintiff to treat the contract as broken and terminate its work under the contract because of delay, no matter how lengthy. It also held that while the contract should be construed to permit the plaintiff to treat the contract as broken and terminate its work thereunder, if the defendant wrongfully failed to make payment as called for by the contract, the plaintiff was not, in fact, entitled so to do because plaintiff's requisitions for payment covered the granite setting (which was included in a separate paragraph of the contract) as well as the concrete work which was the main work to be done under the contract.

FOURTH: The facts on the second trial as to delays on the part of defendant and consequent termination by the plaintiff were in legal effect the same as were contained in the record before this Court. Also the requisitions by which payment was demanded by plaintiff from the defendant were the same as before this Court. The effect of the opinion of the Circuit Court of Appeals is that on the same legal situation as was before this Court, the plaintiff was not entitled to recover damages for breach of contract. Yet the plaintiff had come before this Court on a record showing that it had terminated its work under the contract on the ground that defendant was guilty of absolute breaches because of the same delays and the same

failures to make payment after receipt of the same requisitions; that it had recovered a verdict which was unduly limited in amount, and thereupon this Court held that the case should have been submitted to the jury under instructions which would necessarily have had the effect of permitting a larger recovery by plaintiff on the ground of breach of contract. This Court would not have arrived at this result if it had considered that on the record the plaintiff was on no theory entitled to have the case go to the jury on the question of breach of contract.

FIFTH: The Circuit Court of Appeals based its holding that plaintiff was not entitled to terminate its work under the contract for any amount of delay, on paragraph 7 of the contract which provided for extensions of time for the benefit of the plaintiff in case the work was delayed by the defendant, and held that the provisions of this paragraph controlled the provisions of paragraph 11 which imposed an absolute obligation upon the defendant to provide all labor and materials so as not to delay the material progress of the work. But this Court had already compared, construed and harmonized paragraphs 7 and 11 of the contract and had held as to paragraph 7 that,—

> "The extension of time therein provided for was intended as a dispensation under given circumstances of the liability to liquidated damages imposed upon the sub-contractor by paragraph 6 for failure to complete his work within the time therein elected. The purpose of paragraph 7 is to relieve the sub-contractor. It cannot properly be construed to deprive him of his right under paragraph 11 to reimbursements for

losses attributable to delays assumed by the general contractor." (Opinion, p. 279.)

SIXTH: The contract provided in its first paragraph that plaintiff would do the concrete work on the building. This paragraph was followed by many other paragraphs containing the terms and conditions on which the work was to be done and payment was to be made and defining the rights and relations between the parties. In the last paragraph of the contract certain options were included whereby the defendant had the right to call upon the plaintiff to do certain other work on the building, and one of these options was exercised so that plaintiff became bound to set in position all of the granite for the sum of forty (40) cents a square foot of surface. The twelfth paragraph of the contract named the price to be paid for the concrete work and provided that it should be paid in monthly payments on account, not to exceed in amount eighty-five (85) per cent. of the cost of the work actually erected in the building, provided that the sub-contractor furnished to the general contractors a written requisition on a form to be supplied by the general contractors, not less than twelve days before payment was required. The Circuit Court of Appeals held that payment for the granite work was not governed by this paragraph and that therefore no payment was due until all of the granite work was completed. Plaintiff's requisitions for payment contained claims for the amount of granite work completed to date as well as for concrete work. On this ground, the Circuit Court of Appeals held that the requisitions were incorrect and that defendant was not in default in failing to make payment. (Opinion, C. C. A., pp. 10, 11.)

SEVENTH: In so holding, the Circuit Court of Appeals adopted a view which never has been suggested either by this Court or by either of the Trial Judges or by any of the counsel engaged in the case, either by objection or in their briefs or on oral argument. As a matter of fact, and as pointed out by this Court on page 271 of its opinion, plaintiff's granite work was completed, plaintiff having been discharged from doing further work thereon by agreement with the defendant prior to the rendering of the last requisition for payment which was refused before plaintiff finally elected to terminate its work under the contract. In so holding, the Circuit Court of Appeals not only erred as a matter of law in its construction of the contract, but failed to follow the plain intendment of the decision of this Court which fully construed the contract requirements for payment, having before it the same requisitions, and pointed out what was necessary to be done in order to throw the obligation of making payment on the defendant.

EIGHTH: This Court, on pages 281 and 282, discussed the provisions of paragraph 12 with regard to payments and pointed out certain defects in plaintiff's requisitions but made no suggestion of any such difficulty.

On the second trial the plaintiff fully met the requirements pointed out by this Court and showed that the requisitions were correctly based upon the amount of work actually done at the time the requisitions were submitted.

NINTH: At the first trial of this case the plaintiff requested an instruction as to the measure of damages which was taken from *U. S.* v. *Behan*, 110 U. S. 338. The request was refused by the trial

judge, and accordingly, it was considered by this Court. On page 282 of its opinion this Court quoted the request and said,

> "Had the requested application of these elements of damage been confined to the case of plaintiff being found entitled to recover upon the theory that the contract was rightfully terminated by the notice of May 22, 1912, we assume it ought to have been granted. (*U. S.* v. *Behan,* 110 U. S. 338; *Anvil Mining Company* v. *Humble,* 153 U. S 540, 551, 552; *Roehn* v. *Horst,* 178 U. S. 1, 21.)"

This Court then went on to say that as the requested instruction was not so confined, the refusal of the Court below was not erroneous. Thereupon, at the second trial this same instruction was modified by confining it to the case mentioned and was thereupon given by the trial judge, together with an explanatory addition which added no new elements to the measure of damage. Notwithstanding this the Circuit Court of Appeals held (p. 13 of the opinion) that "the trouble with the instruction is that it embodies a duplication of elements and is misleading," and ruled that it was error to give the instruction.

The Circuit Court of Appeals did not attempt to harmonize its ruling with the language of this Court, and in its opinion did not even refer to the discussion of this Court on the point.

TENTH: Petitioner submits that the constructions adopted by the Circuit Court of Appeals were foreclosed in this case after this Court had fully construed the provisions of the contract as

to delays and payment and the measure of damages and the case had been tried anew in accordance with the opinion and mandate of this Court. Furthermore, your Petitioner submits that, independently of the opinion of this Court, the Circuit Court of Appeals has fallen into errors so grave and fundamental to plaintiff's rights as to justify relief in this Court, as it has no other remedy.

ELEVENTH: Your Petitioner will, in its brief, analyze more fully the opinion of this Court and the opinion of the Circuit Court of Appeals and show the conflict between them and also the errors fallen into by the Circuit Court of Appeals. Two errors were held to have been made in the admission of testimony. Your Petitioner will argue that reversal was not justified on these grounds.

TWELFTH: Unless the decision of the Circuit Court of Appeals for the First Circuit is reviewed by this Court through the issuance of the writ of certiorari herein prayed for, your Petitioner will be irremediably prejudiced, and there remains for it no other method of correcting the errors into which the Circuit Court of Appeals has fallen. After litigating for five years in the effort to recover the large amount of money, upwards of $35,000, which your Petitioner, in endeavoring to carry out its contract with defendant, actually expended beyond what it received, and after having carried its case to this high Tribunal and having obtained therefrom a determination of the fundamental questions involved in the litigation, and after having retried the case in accordance with the law laid down by this court and obtained a verdict fairly representing its actual damages, your Petitioner is now confronted by a decision of the Circuit Court of Appeals, which not only de-

prives it of its just and hard won verdict, but will make it difficult, if not impossible, to recover at all upon a third trial.

THIRTEENTH: Furthermore, if the decision of the Circuit Court of Appeals is permitted to stand, the Trial Court will find itself confronted by two mandates in this case which are irreconcilably conflicting on the most fundamental questions in the case and which are plainly based on divergent views as to plaintiff's rights. The orderly and proper administration of justice requires that the questions be examined and finally determined for the guidance of the trial judge in case a new trial is necessary.

FOURTEENTH: The questions which your Petitioner desires, among other things, to review in this Court, are:

1. Was the Circuit Court of Appeals correct in holding that it was error for the Trial Court to refuse defendant's Seventh request for instruction to the jury as follows:

> "The Court instructs the jury that plaintiff was not justified in rescinding or terminating the said contract because of the alleged lapse of time?"

2. Was the Circuit Court of Appeals correct in holding that under the contract the plaintiff had no right to stop work and hold the defendant liable for damages for breach of contract because of defendant's failure or delay in providing labor and materials not included in the sub-contract in such manner as not to delay the material progress of the work?

3. Was the Circuit Court of Appeals correct in holding that the defendant was under no obligation to make payments to the plaintiff because the plaintiff included in its written requisitions amounts covering the granite work?

4. Was the Circuit Court of Appeals correct in reversing the judgment?

FIFTEENTH: Your petitioner respectfully submits that these questions are of sufficient importance to require the issuance of a writ of certiorari for the following reasons, among others:

1. That public policy, the protection of this Court's jurisdiction and the orderly administration of justice require, once this Court has passed on a case, that the law of the case as embodied in the opinion of this Court and all proper intendments included therein should be followed and applied without question by all courts before which the case subsequently comes.

2. Because the Trial Court, after faithfully and intelligently construing the opinion of this Court and following its plain terms and intendment, should not be reversed and confronted with a mandate ordering it to follow an opinion not in harmony with the opinion of this Court.

3. Because the errors of law into which the learned Circuit Court of Appeals has fallen are fundamental and prejudice your Petitioner to an extraordinary degree.

4. Because your Petitioner will suffer great hardship and damage and be remediless unless the writ of certiorari issues.

Submitted and filed herewith is a certified transcript of the record of the proceedings in the District Court of the United States for Porto Rico as the same were filed and acted upon by the Circuit Court of Appeals for the First Circuit, together with certified copies of the proceedings and opinion in the Circuit Court of Appeals for the First Circuit and of the order made by that court reversing the judgment of the District Court and remanding the case for further proceedings not inconsistent with the opinion.

WHEREFORE, your Petitioner respectfully prays that this Honorable Court be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the First Circuit to bring up this case to ths Honorable Court for such proceedings therein as may be just.

GUERINI STONE COMPANY,
Petitioner.

EDWARD S. PAINE,
Attorney for Petitioner,
62 Cedar Street,
New York City, New York.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF SUFFOLK. } ss.:

EDWIN P. BLISS, being duly sworn, deposes and says: I am the Treasurer of Guerini Stone Company, the Petitioner herein. I have read the foregoing Petition and know the contents thereof and the same is true to the best of my knowledge, information and belief. The reason this affidavit is

sworn to by me and not by the Petitioner is that the Petitioner is a corporation and that I am the Treasurer of said corporation.

EDWIN P. BLISS.

Subscribed and sworn to before me this 28th day of June, 1917.

(SEAL)

James F. Kennedy.

Notary Public.

I hereby certify that I have examined the foregoing Petition and in my opinion the Petition is well founded and that the cause is such that the prayer of the Petitioner should be granted by this Court.

EDWARD S. PAINE.
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1917.

GUERINI STONE COMPANY,
Petitioner,

against

P. J. CARLIN CONSTRUCTION COMPANY,
Respondent.

PETITIONER'S BRIEF.

Preliminary Statement.

The history of this litigation is stated in the petition. The facts in the present record which bear on the questions raised by this petition are in effect the same as when the case was before this Court. The Circuit Court of Appeals evidently considered that no new state of facts had arisen on the second trial because it makes no statement of facts in its opinion, but says, "The opinion of the Court is reported in 240 U. S. 264, where a general statement of the case will be found.

On the second trial, pursuant to the ruling of this Court, the question as to responsibility as between the defendant and the government for the failure of the foundations was not gone into. We believe all other changes in the record which bear on the points at issue are mentioned hereafter in their appropriate places.

POINT I.

The law of the case is established and determined by the language of the opinion of this Court and all necessary and proper intendments thereof. This Court will take all proper measures to protect its jurisdiction and enforce the law of the case if this has not been followed.

Sound public policy requires that there be some definite point where litigation may be said to end, where the final word is spoken. Once a plaintiff has carried his case to the Supreme Court of the United States and has had his cause of action scrutinized and passed upon, then there should be no further question on any point of law or construction which was before the court on the record presented on the first writ of error. On a subsequent writ of error such questions only may be considered as were peculiar to the second trial.

The fact that a different Federal Court acquires appellate jurisdiction by a change of statute and that new judges with different points of view come to pass upon the case does not alter the rule that what has been decided by this Court on one writ of error cannot be re-examined on a subsequent writ brought in the same suit.

The inquiries of the Circuit Court of Appeals should have been primarily directed to determining whether or not the Trial Court had correctly interpreted and applied the mandate of this Court as governed by the opinion. In making this inquiry the Circuit Court of Appeals should have taken the position which the Trial Court and

counsel were bound to take, namely, that the opinion of this Court must be searched for the fundamental underlying principles on which was based its determination of the points before it. We submit that instead of adopting the opinion of this Court as the proper point of departure for all inquiries on matters contained in the record on the first writ of error and steadfastly endeavoring to follow it in all its natural intendments as the Trial Court did and was bound to do, the Circuit Court of Appeals adopted the attitude of reducing the application of this Court's opinion to too narrow limits and, except where constrained by language that could not be overlooked, proceeded to pass upon the case *de novo*.

The decision and mandate of this Court in this case is more than a mere precedent cited in the argument of some other case. There is no question here of distinction between ratio decidendi, argument and obiter dicta. In this case every word uttered by this Court in explanation of its mandate was presumably stated deliberately and with a definite purpose. A reading of the opinion makes it clear that this Court was devoting its time and attention to the disposition of the case as a whole on all of its fundamental points, from the construction of the contract as applied to the facts in the record down to the measure of damages, and that this was being done for the benefit of the Trial Court and the parties and in contemplation of the new trial which was to follow. This was so that the parties and the Courts might, as far as possible, be saved the waste of a second erroneous trial.

Clearly, if there is any doubt whatsoever as to whether the Circuit Court of Appeals has followed the law of the case, this Court will take all proper steps to make full inquiry and to afford relief if

this is found necessary. It is a well recognized rule that this Court will take the responsibility of construing and enforcing its own mandates where a lower Court has in any way failed to do so.

It is proper for this Court "to construe its own mandate in connection with its opinion and if it finds that the Circuit Court has erred or acted beyond its province in construing the mandate and opinion, to correct the mistake now and here." *Gaines* v. *Rugg*, 148 U. S. 228, 238, 244.

Sibbald v. *United States*, 12 Pet. 488;
In re Sanford Fork & Tool Co., Petitioner, 160 U. S. 247, at pp. 255, 256.

On a second writ of error the Court should notice only such alleged errors as were peculiar to the second trial.

Skillerns Executors v. *Mays Executors*, 6 Cranch 267;
Roberts v. *Cooper*, 20 How. 467, at p. 481;
Panama R. R. v. *Napier Shipping Co.*, 166 U. S. 280, at p. 284;
Illinois v. *Illinois Central Rd. Co.*, 184 U. S. 77, at pp. 91, 92;
Clark v. *Keith*, 106 U. S. 464;
Supervisors v. *Kennecott*, 94 U. S., p. 498;
Tyler v. *Maguire*, 17 Wall 253 at p. 284.

The Circuit Court of Appeals erred in construing the contract to the effect that the extraordinary delay shown in the record could not justify plaintiff in terminating its work and suing for damages for breach of contract.

On the second trial the plaintiff put in its evidence to prove the same facts of delay as appeared in the record of the first trial. On the second trial, the testimony of one witness, Mr. Berryman, that after the termination of work under the contract by the plaintiff on May 22d, 1912, conditions were such that it was impossible for plaintiff to continue with its work under the contract until the time of the first trial, November, 1912, was excluded on defendant's objection. There remained in the record, however, the testimony of Mr. Follett to the same effect (Record, p. 43), and the added testimony that at the time the notice was sent, plaintiff's superintendent on the ground estimated the delay that would ensue to be about five months, and that it turned out to be seven or eight months.

On the second trial the suggestion of this Court (p. 271 of the Opinion) that the complaint did not allege delay on the part of the defendant in constructing the foundations prior to October 16th, 1911, was met by an appropriate amendment of the complaint (Record, pp. 46-49).

The evidence of delay put in by the plaintiff tended to show:

That the plaintiff was instructed by the defendant to proceed to Porto Rico and to be ready to go ahead with its work on January 10th, 1911;

That plaintiff complied, and from February 23d, 1911, was ready, willing and able to proceed;

That from February 23d, 1911, to July 11th, it was prevented from doing any work on the building because defendant had not yet provided the foundations on which plaintiff's work must rest;

That from July to September 11th, 1911, plaintiff was further delayed by defendant's failure to provide granite and set it or to call on plaintiff to set it;

That between September 25th and January 12th, plaintiff was delayed because defendant did not, until the latter date, supply all of the granite which had to be set before the principal part of plaintiff's work could go ahead;

That on March 9th, 1912, plaintiff was stopped entirely by defendant because the foundations, which defendant had put in, had subsided.

This was nearly thirteen months or 390 days since plaintiff was notified to proceed and it was eight months or 240 days since the foundations were actually ready to receive the granite, and about 159 days after plaintiff was notified to begin setting granite.

All work continued to be stopped and in April, 1912, while investigation of the foundations was in progress, it became evident to plaintiff that a further delay of five months was inevitable before plaintiff could begin its work anew. It turned out to be eight months before plaintiff could have again begun its work, with seventy-five per cent. of its work then remaining to be done, and this would have required, under regular conditions, about 150 days more to complete after work could be resumed. This totals about 800 days on a contract which contemplated completion in 300 days and which, according to the testimony, could have been completed under normal working conditions, in 200 days.

A. *In holding that, under the contract, plaintiff could not be justified, on the ground of delay, in sending its notice of termination, the Circuit Court of Appeals failed to follow the construction of the contract adopted by this Court.*

In order properly to appreciate what was really held by this Court on this question the following matters in the opinion should be taken into view.

On page 265 the Court precedes its statement of facts with a recital that reversal is being asked "upon the ground that through erroneous rulings made by the Trial Judge the recovery was unduly limited."

Beginning its statement of facts on page 265, the Court, in its opinion, quotes fully from paragraphs 1st, 25th, 6th, 7th, 11th and 12th of the contract comprising all of the paragraphs which the Circuit Court of Appeals took into consideration in arriving at its construction of the contract (Opinion, pp. 265-268 incl.).

The Court then summarizes the pleadings including that part of the complaint which alleged that because of defendant's breach of contract, plaintiff, under date of March 22d, 1912, notified defendant in writing of its election to terminate the contract and bring its action for damages for breach thereof (p. 269). The Court then proceeds to state the facts brought out on the trial, introducing this by saying, "Plaintiff introduced evidence tending to support the material averments of its complaint."

On pages 270, 271 and 272 the Court recites fully the facts of delay down to and including the complete stoppage of the work on March 9th, 1912.

On page 274 the Court quotes fully from the written notice of termination from plaintiff to de-

fendant of May 22d, 1912, this notice being based on delay and failure to make payment and also quotes from defendant's reply to this letter, where defendant stated that "said letter is a breach of contract on your part."

On pages 278 and 279 the Court clearly construes paragraphs 7 and 11 of the contract. The Circuit Court of Appeals bases its holding on paragraph 7 which provided for an extension of time for plaintiff's benefit in case of obstruction or delay. But this Court clearly held that

> "the extension of time herein provided for was intended as a dispensation, under given circumstances, of the liability to liquidated damages imposed upon the sub-contractor by Paragraph 6 for failure to complete his work within the time therein limited. The purpose of Paragraph 7 is to relieve the sub-contractor. It cannot properly be construed to deprive him of his right under Paragraph 11 to reimbursement for losses attributable to delays assumed by the general contractor."

On page 279 this Court also held that,

> "To furnish the foundation defendant assumed an obligation not conditioned by the question whether it was at fault or whether the delay was involuntary * * *."

Thus this Court held that Paragraph 11 imposed on the general contractor an absolute obligation to provide all labor and materials not included in the sub-contract in such manner as not to delay the material progress of the work.

From the absolute breach of this absolute obli-

gation the ordinary contract rights and remedies should arise. The ordinary rule, and in a case like this, the obviously fair rule is that the injured party may elect not to proceed with his part of the contract and to hold the other party liable for his damages. The fact that plaintiff had the right to reimbursement for losses attributable to delays does not deprive him of his ordinary remedy to terminate his work for defendant's absolute breach.

Strauss v. *Yeager,* 93 Northeastern Rep. 877, at pages 881, 882.

On page 279 the Court holds that Paragraph 7 did not cut off plaintiff from the right "to recover damages or money compensation," even though some of the delay may have been caused by alterations required by the United States Government.

Thereupon, turning to questions raised as to the measure of damages, this Court held that it was error to exclude testimony showing prospective profits (Opinion, p. 280).

On pages 281 and 282 the Court held that on the testimony and the record before it, it could not be said that plaintiff's requisitions for payment were sufficient to justify a requested instruction that because of failure to make payments, the plaintiff was justified in stopping work under the contract and recovering damages. This, it will be seen, eliminated from the record before this Court plaintiff's second ground of justification for its termination on May 22d, 1912. On the record before this Court plaintiff could only be held entitled to terminate on the ground of delay.

On page 282 the Court discussed one of plaintiff's requests to charge which had been refused. The request was based on *U. S.* v. *Behan,* 110 U. S. 338, and was solely applicable to the case where

plaintiff was entitled to recover damages for an absolute breach of the contract. Referring to this requested instruction, this Court said:

> "Had the requested application of these elements of damage been confined to the case of plaintiff being found entitled to recover upon the theory that the contract was rightfully terminated by the notice of May 22, 1912, we assume it ought to have been granted. *United States* v. *Behan*, 110 U. S. 338; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 551, 552; *Roehm* v. *Horst*, 178 U. S. 1, 21."

Accordingly, it appears that this Court had before it and fully considered the pleadings and proof in the case as to delay, the termination by plaintiff of its work on the ground of delay, the various clauses in the contract which bore on plaintiff's rights arising from defendant's delay; that on the record no other ground for termination but delay was open to plaintiff, and that this Court proceeded in the light of this situation to apply measures of damage which concededly could only be applicable in the event that defendant had been guilty of an absolute breach of its contract, justifying plaintiff in refusing to proceed with its work.

Clearly, on any other theory, it would not have been erroneous for the Trial Court to exclude testimony as to anticipated profits. Equally clearly, this Court had in mind in discussing the measure of damages taken from the Behan case, that on the record before it, the jury might find that the contract was rightfully terminated by the notice of May 22d, 1912. To say that the language of the Court above quoted on this point is a mere

assumption *arguendo* and can be disregarded is to close the eyes to the obvious intent and purpose of the Court in discussing the point at all. This Court was pointing out for the benefit of the Trial Judge and counsel, the proper measure of damages to be applied. If, on the record before it, this Court was not of opinion that the jury could have found on the first trial that the notice of termination of May 22d, 1912, was rightful on the sole ground of delay (the ground of non-payment having been expressly eliminated by this Court), it never would have used the language quoted.

We submit that the Circuit Court of Appeals completely misunderstood the purport of the last paragraph of the opinion on page 283. The Circuit Court of Appeals quoted this paragraph as its basis and justification for holding that this Court had not passed on the two questions of contract construction which were fundamental to plaintiff's right to terminate performance. As a matter of fact, there were several assignments of error raised in plaintiff's brief on the first writ of error which this Court evidently felt it unnecessary to consider, in view of the fact that it had fully covered in its opinion, in connection with other assignments of error, all of the fundamental questions involved in the case. It was not the fundamental questions raised that this Court passed without consideration, but the particular assignments of error referred to. (See Exceptions Nos. 21 and 25 Record on the first writ of error, pp. 153 and 154.)

B. ***In so holding, and independently of the language of this Court, the Circuit Court of Appeals erred as a matter of fundamental law and contract construction.***

The Guerini Stone Company was formed by Mr.

Guerini and Mr. Converse with headquarters at Boston, and the P. J. Carlin Construction Company had its headquarters in New York. The work contemplated by the contract was to be done a great distance away, in the Island of Porto Rico. The work called for by the contract, particularly the casting of concrete so as to resemble sandstone, required a high degree of skill and ability in a particular line. The work under the contract required the organization of a working force with most of the skilled labor coming from the United States, to be sent to Porto Rico and there maintained during the progress of the work.

Obviously, the inducement to plaintiff to enter into the contract was the prospect of making money, that is, performing the work at a lower cost than the contract price. It is obvious that the cost of the work would depend directly on the length of time which it would take plaintiff to perform it. It is not a case where plaintiff could shut down operations and wait indefinitely for their renewal without serious loss and damage to itself. In the case of an indefinite delay, plaintiff would be obliged to maintain its organization continuously ready and able to take up the work again on short notice. Every surrounding circumstance shows that a fair and just construction of the contract requires that the defendant be held strictly to its obligation not to delay the material progress of the work. It apparently is not contended that this obligation on defendant's part was not absolute and definite, but the Circuit Court of Appeals contends that the only remedy for a breach of this obligation is a suit for losses or repeated suits for losses from time to time, conditioned upon the plaintiff's always maintaining itself ready and able to proceed with the work. Under the circumstances this remedy is no remedy at all.

The only adequate protection for plaintiff was, once the delay became so material as to alter the situation which the parties had in mind in making the contract so as to make performance of the contract a new and different thing, to refuse to continue to be bound on its part and to terminate its work, to discharge its men, cut off further expense and hold the defendant liable for damages for breach of contract. We submit that a court of justice should require words clearly incapable of no other instruction, before it would hold a subcontractor under a contract of this nature is bound to keep itself dangling year after year, although prevented from continuing its work through the general contractor's fault, with only the cold comfort of an occasional suit for damages for its losses.

The ordinary rule of law applicable to contract cases is that where there are mutual obligations, a default in compliance with a substantial obligation by one party gives rise to a right in favor of the other to terminate its performance under the contract and to sue for damages for breach. This is generally applied and the burden is heavy upon a party urging any other construction to sustain its contention by language clearly expressing an intention and understanding on the part of the parties that this important right has been surrendered.

By its requested instruction No. 19 (R. p. 359), which was given, defendant conceded that "unusual and extraordinary delays" would constitute a breach of the contract. Having requested this instruction, defendant is bound by it and cannot claim otherwise on writ of error.

POINT III.

The Circuit Court of Appeals erred in holding that plaintiff's requisitions for payment were insufficient to throw the burden of payment on the defendant by reason of the inclusion of granite work.

A. *The holding of the Circuit Court of Appeals was contra to the intendment of the decision of this Court.*

On pages 281 and 282 of its opinion this Court discussed the question of plaintiff's termination on the ground of non-payment. The requisitions were the same in both records. The testimony as to non-payment was to the same effect and the only difference in the record of the second trial is because of the fact that plaintiff took advantage of the criticism of this Court contained in the words, "But the evidence fails to show that the requisitions were based upon the cost of the work or that any clear statement of such cost was submitted with them."

On the second trial, after proving that the parties had agreed on a unit price covering the concrete work on which a requisition for payment was to be based and accepted, plaintiff proved that at the time that the requisition of March 9th was rendered in the sum of $18,237 it was correct and based on the actual amount of work then done, multiplied by the agreed unit.

On page 193 of the record plaintiff put in testimony to prove that the number of cubic yards of concrete actually in place, multiplied by the agreed unit, and the number of square feet of granite

actually set, multiplied by the contract price, correspond with the figures enclosed with the application of March 9th. It is to be noted that the contract called for applications on a printed form to be furnished by the defendant (Paragraph 12th of the contract). The printed form as furnished in blank by the defendant is shown by Plaintiff's Exhibit 12. The only statement called for on defendant's printed form applying to work done is as follows:

"Amount of work completed to date, $.....
Cash received, $.....
Charges, $.....
Amount of—per cent. reserve, $.....
Total, $.....
Amount of this application, $....."

In the application of March 9th (Plaintiff's Exhibits 18 and 19, Record, pp. 393, 394 and 395), all the information called for by defendant's blank was filled in and submitted and the correctness of the figures was proved by testimony as to the actual amount of work done and the application of the correct multiples for price. (R., p. 193.)

The Circuit Court of Appeals evidently was satisfied that the plaintiff had complied with the requirements of the Supreme Court in this regard.

In view of the fact that the inclusion of granite setting in the requisitions was before this Court on the first writ of error, and in view of this Court's careful consideration of the requisitions and their effect, we submit that any new construction of the contract, holding the requisitions ineffective because of the inclusion of granite, is foreclosed by the opinion of this Court.

Even if such a construction had been suggested to the Trial Court, we submit that he would not

have felt justified in adopting it in view of the mandate and the careful consideration which the requisitions and unit prices had received at the hands of this Court.

B. *In so holding, the Circuit Court of Appeals erred as a matter of fundamental law and contract construction.*

The contract was a regular form containing blanks to be filled in, covering the work to be done, price, duration and other details. The first paragraph provides for work which it was definitely agreed should be done by plaintiff. This paragraph is followed by twenty-three others, setting forth the terms and conditions under which the work was to be performed. These terms and conditions included, among many others, provisions that the sub-contractor would comply with the drawings and specifications and provide at its own expense, scaffolding implements, etc.; that no alterations were to be made in the work or materials, except upon written order, and changed values should be computed and subject to arbitration; provision for safe and proper facilities for inspection by the owner, obedience to architects' instructions, time of completion, obtaining of permits and a large number of other provisions, all of which were obviously applicable to the granite work as well as to the concrete work. We submit that if it had been suggested at any time to the general contractor that the granite work was not covered by the general provisions of the contract, the proposition would have been received with incredulity. The whole form of the contract shows that the parties contemplated an absolute obligation to do the concrete work and an option on the part of the contractor to call upon plaintiff to

do the granite work, all to be governed by the general provisions of the contract, and that the general provisions as to monthly payments on account after receipt of requisitions were understood by both parties to apply to payments for the granite work as well as for the concrete work.

Furthermore, the construction adopted by the Circuit Court of Appeals has never been suggested by any judge or any lawyer in the history of this litigation, until the Circuit Court of Appeals handed down its decision. This is as conclusive as anything could be as to the interpretation which the defendant put on its own contract. No objection on this ground was made by defendant at the second trial when the requisitions were offered; in all discussions between the parties as to requisitions and payment, no suggestion was made that the defendant objected to the requisitions on this ground. If the contract is to be so construed, the defect was clearly waived.

Finally, the Circuit Court of Appeals seems to have ignored the fact that plaintiff's granite work under the contract was completed because the parties mutually agreed that plaintiff should do no more granite work in February, 1912. On page 271 of its opinion, this Court said: "On or about February 12, 1912, plaintiff stopped setting granite with defendant's consent."

Accordingly, on March 9th, when plaintiff's last and most formal requisition was made, the granite work was in fact completed, as far as plaintiff was concerned, and even if the construction adopted by the Circuit Court of Appeals can be sustained it had no application to the final requisition and the record contained the facts justifying termination by the plaintiff for the defendant's failure to make payments.

We submit that the case should not be sent back

for a new trial on a mandate ordering the Trial Judge to hold that the requisitions were insufficient on the present state of the record.

POINT IV.

In holding that the Trial Court erred in its instructions as to the measure of damages the Circuit Court of Appeals failed to follow the decision of this Court and was in error.

On page 282 of its opinion, this Court said:

> "Error is assigned because of the refusal to instruct the jury as follows:
>
> 'In estimating the recovery to which the plaintiff is entitled, if you find he is entitled to recover, you should consider the reasonable expenditures incurred, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work as the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract.'
>
> "Had the requested application of these elements of damage been confined to the case of plaintiff being found entitled to recover upon the theory that the contract was rightfully terminated by the notice of May 22, 1912, we assume it ought to have been granted. *United States* v. *Behan,* 110 U. S. 338; *Anvil Mining Co.* v. *Humble,* 153 U. S. 540, 551, 552; *Roehm* v. *Horst,* 178 U. S. 1, 21."

We submit that this language of this Court was not to be lightly disregarded, as a mere assumption, by the Trial Court or by the Circuit Court of Appeals. Here again, the Supreme Court was pointing out, for the benefit of the Court and parties upon a second trial, the defects which it found in the requested charge and indicating how the defects should be remedied so as to leave a charge which could properly be given. Under the circumstances it was the plain duty of the Trial Court to give the charge, once such defects were remedied.

At the second trial the charge quoted by the Supreme Court was requested by plaintiff with a proper limitation confining its application to the case of plaintiff being found entitled to recover upon the theory that the contract was rightfully terminated. It was thereupon given by the Trial Court, with an addition that added no new elements for the jury's consideration in approaching the question of damages.

The charge as given by the Trial Court was as follows:

> "Returning now to the question of damages, supposing the first point to be settled in your minds, which I do not direct you at all is settled, in estimating the recovery to which the plaintiff is entitled, if you find he was justified in terminating the contract as he did on May 22 upon the principles above given you, you can consider the reasonable expenditures incurred by the plaintiff, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete

> the work under the contract. So the different items that you may, if you come to the question, take into account, are the outlays less the material on hand, the amount actually performed and the profits, if you find there were any which were not speculative. The measure of profits is the contract price less what is shown to you as the expense of carrying out the contract, if that is shown to you to your satisfaction."
>
> (Record, p. 374; C. C. A. Opinion, p. 13.)

With regard to this charge, the Circuit Court of Appeals held that, "The trouble with the instruction is that it embodies a duplication of elements and is misleading."

We respectfully submit that any such question as to this charge was foreclosed by the opinion of this Court and that on a second writ of error the question of duplication of elements or tendency to mislead was not open for re-examination.

The Circuit Court of Appeals apparently ignored the language of this Court on this subject, as no reference is made to it in its opinion.

Furthermore, we submit that the assumption of this Court that this instruction, if properly confined, should have been given, was correct in view of the cases cited.

If there were any duplication of elements in the charge criticized, the duplication was cured by the Trial Court in other parts of his charge, particularly on page 364, where the Court said:

> "The man who is injured, if that be the case, is entitled to be put back where he was * * *. The object is to put a man back where he was, to reimburse him * * *. He

> is entitled to recover what he has lawfully expended in trying to carry out his contract. That would cover a number of things. It would cover his own labor. It would cover the labor that he has put on the job. It would cover the material he has supplied and perhaps one or two other things, but that would be the substantial feature of it on that line. The other line of recovery is that where he can show that he would have made a profit, he is entitled to the profit that he has been prevented from obtaining. *He can recover what he has actually lost in money or labor or material and he can recover what he would have made if the other party had permitted him to carry on the contract.*" (Italics ours.)

The Court also instructed the jury (Record, p. 371) that the loss would consist of "two distinct items of damage, first, his outlay and expenses, less the value of materials on hand, second, the profits he might have realized by performance."

Finally, as shown by the evidence of damages introduced, no item of damages was permitted to go to the jury that would not be covered by the language of the Circuit Court of Appeals on page 13 of its opinion, with the exception of the value of the tools which is discussed under our next point.

POINT V.

The opinion of the Circuit Court of Appeals shows no other ground on which the judgment should have been reversed.

The other two points mentioned by the Circuit Court of Appeals as errors in the record were questions of the admission of evidence. Into these questions we will not go deeply on the petition for a writ of certiorari. If the writ is allowed, we will argue more fully to the Court when the case comes before it that neither of these grounds should have been justified reversal.

A. One ground was that the testimony showing an agreement between the parties, posterior to the contract, fixing a unit on which requisitions for payment should be based, was inadmissible without an amendment to the complaint, alleging an amendment to the contract. The contract provided a method of payment which left the proper amounts open as a practical matter to much possibility of dispute. As a practical construction of the contract, the parties agreed on a unit price to be used in figuring requisitions. This added nothing to the contract and took nothing away from it, but simply provided a practical method for compliance with the terms of the contract. It was not a modification of the contract, but a practical construction of it and so did not require any amendment to the complaint. The Trial Court treated it as a practical construction of the contract as shown by its language in instructing the jury, on page 368 of the Record, where he said:

> "It was the right of these two gentlemen of these two companies to agree upon a *modus operandi*. A written contract in the nature of the case cannot specify all the details that would come up from day to day, ways of doing different things, so that if these two gentlemen, on February 2d, or any other time, agreed upon a unit upon which payments were to be made, that is an important point."

See the following cases:

Carazos v. *Trevino*, 6 Wall 773, at p. 785;
Chicago v. *Sheldon*, 9 Wall 50, at p. 54;
Topliff v. *Topliff*, 122 U. S. 121, 130, 131;
District of Columbia v. *Gallagher*, 124 U. S. 505;
Constable v. *National Steamship Co.*, 154 U. S. 51, 95;
Lowrey v. *Hawaii*, 206 U. S. 206, 222;
Kidwell v. *The Baltimore & Ohio R. R. Co.*, 11 Gratt 676;
Vermont & Canada R. Co. v. *Vermont Cent. R. Co.*, 34 Vermont 1.

As a matter of fact, defendant was not surprised or prejudiced in any way by the introduction of this testimony without an amendment because all of the testimony was put in at the first trial without objection by the defendant.

B. Evidence was received that tools to the value of $3,500 which belonged to the plaintiff, had been retained by the defendant after plaintiff terminated the work and plaintiff claimed that the value of these tools, which otherwise would have remained on hand should not be deducted from the amount of its expenditures for this reason. The Circuit

Court of Appeals held that this was error. We will not, on this petition, argue this point, but will merely point out that even if this item of damage was improper, the Court, rather than to reverse the judgment on this ground alone, should follow the well known practice of affording the plaintiff an opportunity to remit this amount, and in that case, affirming the judgment.

Phillips & Colby Construction Co. v. *Seymour,* 91 U. S. 646 at p. 656;
Washington & G. R. Co. v. *Harmon,* 147 U. S. 571, 590;
Hansen v. *Boyd,* 161 U. S. 397, 411, 412;
Loewer v. *Harris,* 57 Fed. 368;
Hazard Powder Co. v. *Volger,* 58 Fed. 152.

LASTLY.

This is a case where this Court should examine into the judgment of the Circuit Court of Appeals on a writ of certiorari.

We have stated in our petition the grounds why the extraordinary relief of certiorari should be granted. This is peculiarly a case for such relief. This court has already passed on the whole case and the question is directly raised whether the trial court proceeded in accordance with the mandate of this court.

For five years this plaintiff has been struggling to recover in a case where a large sum was actually paid out by it and where the defendant has had the benefit of plaintiff's work and been paid for it. Two juries have resolved the merits in favor of the plaintiff. This Court has fully laid down the law of the case and the second trial was fairly conducted in conformity therewith. The amount of the verdict corresponds with the amount proved to have been laid out—without anticipated profits—plus interest. In such a case, if plaintiff has been deprived of its hard earned verdict by any misconception of law, justice requires that the wrong be righted.

Respectfully submitted,

EDWARD S. PAINE,
Attorney for Petitioner,
62 Cedar Street,
New York, New York.

EUGENE CONGLETON,
Of Counsel.

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FILED
MAY 25 1918
JAMES D. MAHER,
CLERK

In the

Supreme Court of the United States

OCTOBER TERM—1917.

No. [redacted]218

GUERINI STONE COMPANY,
Petitioner,

against

P. J. CARLIN CONSTRUCTION COMPANY,
Respondent.

Affidavit, Motion and Notice of Motion to Advance Cause.

EDWARD S. PAINE,
Attorney for Petitioner,
62 Cedar Street,
New York City.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

GUERINI STONE COMPANY,
Petitioner,
against
P. J. CARLIN CONSTRUCTION COMPANY,
Respondent.

Sir:

PLEASE TAKE NOTICE that upon the annexed affidavit of Edward S. Paine, sworn to on the 16th day of May, 1918, I shall make the motion hereto annexed before the Supreme Court of the United States, at the Capitol, City of Washington, District of Columbia, on the 3rd day of June, 1918, at the opening of Court on that day or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dated, New York, May 16, 1918.

Yours, &c.,
EDWARD S. PAINE,
Attorney for Petitioner,
62 Cedar Street,
New York City.

To
JOHN C. WAIT, Esq.,
CHARLES HARTZELL, Esq.,
Attorneys for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1917.

GUERINI STONE COMPANY,
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P. J. CARLIN CONSTRUCTION COMPANY,
Respondent.

Now comes the petitioner herein, Guerini Stone Company, by Edward S. Paine, its attorney, and moves this Honorable Court upon the annexed affidavit, sworn to on the 16th day of May, 1918, to advance this cause on the calendar of this Court on the ground that this cause has heretofore been adjudicated by this Court upon the merits, and for such other and further relief in the premises as may be just.

EDWARD S. PAINE,
Attorney for Petitioner,
62 Cedar Street,
New York City.

Affidavit.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1917.

GUERINI STONE COMPANY,
Petitioner,
against
P. J. CARLIN CONSTRUCTION COMPANY,
Respondent.

State of New York, }
County of New York, } ss.:

Edward S. Paine, being duly sworn, deposes and says: That he is and at all times since the commencement of this suit has been the attorney of record for the petitioner herein.

This is a suit at law for damages for breach of contract. The complaint was filed in the District Court of the United States for Porto Rico on the 18th day of June, 1912. The case was tried before a jury which rendered a verdict on the 16th day of November, 1912, in favor of the plaintiff (the petitioner herein), in the sum of Six thousand six hundred nine and 25/100 ($6,609.25) Dollars. Being dissatisfied with the amount of the verdict, the plaintiff, under the appellate procedure in force at that time, sued out a writ of error to this Court.

Reversal was sought on the ground that because of erroneous rulings on the part of the Trial Judge, the plaintiff's recovery was unduly limited. The judgment was reversed by this Court on February 21, 1916. An opinion was written by Mr. Justice Pitney, which is printed in 240 U. S., 264.

The adjudication made by this Court on the former writ of error was upon the merits and the case was reversed and remanded for a new trial upon the merits, with instructions that it be tried anew in accordance with the opinion of the Court. A new trial of the case was thereupon had before the judge of the District Court for Porto Rico and a jury, and on the second trial on June 8, 1916, the jury rendered a verdict in favor of the plaintiff in the sum of Forty-four thousand four hundred eighty-two and 63/100 ($44,482.63) Dollars.

The defendant thereupon sued out a writ of error to the Circuit Court of Appeals for the First Circuit, appellate jurisdiction over the District Court of the United States for Porto Rico having been conferred upon that Court in the meantime. The Circuit Court of Appeals for the First Circuit thereupon considered the case on the merits and on April 1, 1917, reversed the judgment and ordered the case remanded to the District Court of the United States for Porto Rico for a new trial on the merits.

Petitioner thereupon petitioned this Court for a writ of certiorari on the ground, among others, that the decision of the Court of Appeals for the First Circuit was contrary to the decision of this Court on the first writ of error. The writ of certiorari was granted by this Court on October 8,

1917. This cause is now duly docketed with the Clerk of this Court, No. 557, October Term, 1917.

Petitioner now moves this Court to advance this cause upon its docket in conformity with Subdivision 4 of Rule 26 of the Rules of this Court on the ground that this case has been once adjudicated by this Court upon the merits.

EDWARD S. PAINE.

Sworn to before me this
16th day of May, 1918.

WILLIAM H. WILSON,
Notary Public,
Kings County.
Certificate filed in New York County.
(Notarial Seal.)

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IN THE

Supreme Court of the United States

OCTOBER TERM 1917.

GUERINI STONE COMPANY,
Petitioner,

against

P. J. CARLIN CONSTRUCTION COMPANY,
Respondent.

POINT I.

The statements by the petitioner in its petition for a writ of certiorari, are not in accordance with the facts, but are strongly colored with the unwarranted views and erroneous conclusions of the petitioner.

FIRST: The action is *not* for damages for a breach of contract *alone*. The complaint is an omnibus instrument embodying not only an action for breach of contract and for damages resulting therefrom, but is an action on *quantum meruit* (Record, fols. 20-33, Amdd. fols. 81-4, 90-2).

The Supreme Court in its opinion, 240 U. S., 264, neither quoted nor considered all of the clauses of the contract, and did not attempt to

construe them, but only a very limited part of said contract, and then *only with respect to errors claimed by the plaintiff* or the defendant. Respondent has no fault to find with the Trial Judge nor does he deny that the Trial Judge conscientiously tried the case in the light of his understanding. The verdict and judgment in favor of the plaintiff for approximately $45,000 was a *miscarriage of justice.*

SECOND: Respondent denies that the Circuit Court of Appeals *construed the identical clauses of the contract differently,* or came to any different conclusions or to conclusions that are directly contrary to the plain purport and opinion of this Supreme Court.

THIRD:

FOURTH: The petitioner in his statement *Fourth,* that

> "The facts on the second trial as to delays * * * were in legal effect the same as were contained in the record before this Court"

is erroneous. The facts proven at the second trial were not only different, but *the testimony adduced was very much limited and restricted.*

The requisitions demanding payment were likewise restricted by the Trial Court. The legal situation is not the same as it was before this Supreme Court, and the decision of the Circuit Court of Appeals, First Circuit, is not *contra* and does not controvene the law as laid down by this Court. The rulings of the Trial Court were not only *contra,* but made on an entirely

different view of the case from that of the Judge at the first trial. The Trial Court in the present record expressly limited all testimony to *the acts of the parties prior to May 22, 1912,* when the plaintiff, by letter, expressly terminated and rescinded the contract between the parties. This expressly limited the delays to delays that may have occurred prior to May 22, 1912, because on that date, the plaintiff terminated the contract. Payments were duly made upon requisitions in the full amount that the plaintiff was entitled to. There was no breach in respect to payments. The petitioner recites his own views of what

> "would necessarily have had the effect of permitting a larger recovery by plaintiff on the ground of breach of contract"

and that

> "this Court would not have arrived at this result if it had considered that on the record the plaintiff was, on no theory, entitled to have the case go to the jury on the question of breach of contract."

FIFTH: The Circuit Court of Appeals did not decide what the petitioner states in Paragraph *Fifth.* Its decision was not nearly as broad, and there are no such words employed in the opinion as petitioner has injected into this paragraph.

SIXTH: It would seem that petitioner had, in this paragraph, injected matters which form no part of a petition, for a writ of certiorari. No

right is conferred upon the petitioner to make a general appeal to the United States Supreme Court from the determination of the Circuit of Appeals. Petitioner does not state that the United States Supreme Court, in its opinion, *passed upon or dwelt upon this point of law.* Whether or not it was raised at the trial or in the briefs, the point is well taken, and the law applied to it would seem to be sound. The contract only provided for payments for concrete, and there *was no provision whatever for payments on account of granite work,* and the same would become payable only upon completion of the work.

The work was never completed as to quantity, and the work was never completed in accordance with the specifications for the reason that *it was never cleaned down nor pointed* as was required by the contract. Payment therefore never became due for the granite.

SEVENTH: The granite work was never completed, and was never pointed nor cleaned down. Neither the respondent nor the Government architect *ever expressed its or his satisfaction with or acceptance of the work.* Payment for this work was never refused for the reason given. No demand or requisition was ever made for the granite work, except as a part of the application for concrete work, and then in an amount *greatly in excess of what was due.*

There was no *plain intendment* of any part of the decision of the Supreme Court with respect to applications for payment for granite work. The Supreme Court in no way passed upon *this question of separating the granite work from the concrete work.*

EIGHTH: The respondent cannot admit the truthfulness of petitioner's statements in this paragraph, and denies that the requisitions were correctly based upon the amount of work actually done at the time the requisitions were submitted. The requisitions or applications were not based upon the cost of the work as the contract required, but were at three times the cost.

NINTH: It is submitted that the opinion of the Circuit Court of Appeals is in accord with the opinion of this Supreme Court. The respondent has taken the position that the Supreme Court made no determination as to the measure of damages, but expressly pointed out to the petitioner the distinction between the case at bar and the *United States* v. *Behan,* 110 U. S., 338 case, and this Court expressly held that *it was not error to refuse* the instruction requested by petitioner at the first trial.

This Court said:

> "Had the requested application of these elements of damage been confined to the case of plaintiff being found entitled to recover upon the theory that the contract was rightfully terminated by the notice of May 22, 1912, *we assume it ought to have been granted.*"

"But as already pointed out, other grounds of action were declared upon:

> (a) Defendant's failure to provide granite blocks prior to October 6, 1911;
>
> (b) Its failure between that date and March 19, 1912, to provide necessary mate-

rials and carrying on its part of the construction work; and

(c) A *quantum meruit* for labor performed and materials furnished.

In the event of plaintiff's recovery being based upon these grounds only, some of the elements indicated in the request *would not be properly applicable.*"

At the second trial, the *plaintiff-petitioner retained all of these grounds of action in its complaint,* and went to the jury on the whole question of damages for the different periods of delay and on the *quantum meruit* set forth in its complaint (see plaintiff's request for instructions and the Court's instructions to jury, Record, pp. 351-4 and 363-7). The plaintiff-petitioner also went to the jury on an instruction by the Court that authorized and permitted it to recover for the damages *which it actually suffered by reason of the delay caused by the defendant-respondent* (Record, fol. 1129). No Court could tell upon what ground or theory the jury awarded its verdict, whether for damages resulting from breach by the defendant due to delay, or non-payment of requisitions, or for damages caused by the delay and during the period of delay, or on *quantum meruit* of the work done and materials furnished by the plaintiff-petitioner. It would seem it awarded damages on all the grounds.

There was no determination strictly by this Court as to *the measure or elements of damage.* The Court merely recited in its opinion that under certain conditions "we assume it ought to have been granted" but held that the instruction

requested *"might have misled the jury,* and hence there was no error in refusing it."

The Circuit Court of Appeals in the oral argument when the case was presented, pointed out to the petitioner's counsel that *the instruction embodied a duplication of the elements of damage,* and was misleading, and the petitioner's counsel was unable to meet the judge's arguments in the Circuit Court, and it was a foregone conclusion at the oral argument that the instruction undoubtedly did embody duplication of damages. It is submitted that an instruction to a jury which permits a claimant to recover:

(1) the reasonable expenditures incurred; i. e. the plaintiff's disbursements.

(2) the unavoidable losses incident to stoppage;

(3) the amount of work actually performed;

(4) the amount due for work done at the contract price;

(5) the prospective profit

is such a duplication of the elements of damages as would be misleading to a jury.

No such charge could be sustained under an action for damages for breach of contract.

TENTH: If the Circuit Court of Appeals has fallen into any errors, they are errors in favor of the plaintiff-petitioner. The case *was not tried* in accordance with the opinion and mandate of the Supreme Court, and has therefore been reversed.

ELEVENTH:

TWELFTH: Petitioner may be practically precluded from any recovery at a new trial under the decision of the Circuit Court of Appeals. Its recovery must be in accordance with its agreement if at all. Certainly the United States Supreme Court in its opinion did not construe the contract nor set forth the law in such a manner as to give to the plaintiff-petitioner *any assurance of an ultimate recovery* in its litigation. A review of the first appeal will show that for some unknown reason, at least unknown to the defendant-respondent, the defendant's then attorney of record failed to appear and argue the cross-appeal that had been taken in the case, and the plaintiff-petitioner had his own way without any opposition in its presentation of the appeal to the United States Supreme Court, in its appeal from the first trial. The Supreme Court determined only the questions and errors presented to it, and it is the height of presumption for the plaintiff-petitoner's counsel to assume that the United States Supreme Court exercised its authority to make a determination of all the questions of law and construction of all the clauses of the contract that would enable the plaintiff-petitioner to present its case and to make a complete recovery.

That is not the office of an Appellate Court, but rather to determine whether or not error is made below, which will warrant a reversal and retrial. No doubt the plaintiff-petitioner feels aggrieved that it is deprived of its hard-won verdict, and that it is in a position which "makes it difficult, if not impossible, to recover at all upon a third trial."

THIRTEENTH: The Trial Court will not be "confronted by two mandates in this case, which are irreconcilably conflicting." That statement is merely a statement, and the petitioner has not pointed out by any comparison of the opinions of the Circuit and Supreme Court that such is the case.

FOURTEENTH:

FIFTEENTH: 1. It is not assumed that this Court's pride or dignity is to be moved by such an appeal as is made in this paragraph. The First Circuit Court of Appeals may be entrusted and depended upon to protect this Court's jurisdiction and the orderly administration of justice. Petitioner's case depends upon what he chooses to designate as *"all proper intendments included,"* which are his own views and understandings of the opinions of this Court in contradiction to the views and opinions of the First Circuit Court, in an unanimous opinion.

2. This is merely a request that the Trial Court's intelligent construction of the opinion of the Supreme Court should be accepted in preference to that of the opinion of the Circuit Court of Appeals.

3. This motion is based upon the presumption that there are errors of law, fundamental and prejudicial to petitioner to an extraordinary degree.

4. This motion is made because the petitioner feels itself defeated.

It is submitted that nothing in the petition as presented would warrant the issuance of a writ of certiorari to the Circuit Court of Appeals for the First Circuit.

POINT II.

The facts proven at the second trial are not the facts proven at the first trial, and the pleadings have been amended.

The evidence at the second trial is greatly limited and restricted as compared with that of the first trial. Much was properly excluded at the second trial, and the record is materially different. As the Trial Court said, at the trial:

> "The Supreme Court is discussing *the evidence* that was in the case, *however it got there I do not know, and it* (the Court), *was perfectly right in going* (deciding) *upon what was before it.* I think my ruling is right" (Record, fol. 573).

The Supreme Court itself, in its opinion in speaking of the testimony taken at the first trial, says:

> "That notwithstanding the plaintiff was limited by his pleadings, *that the evidence was not limited.*"

Mr. Justice Pitney, in delivering the opinion of the Court, says:

> "Defendant to some extent disputed the facts recounted in and inferable from plain-

> tiff's evidence, but based its defense principally upon the provisions of the contract between defendant and the Government which it was insisted must be read into the contract between plaintiff and defendant."

In the second trial, every part of the case was sharply contested, and plaintiff was limited by the rules of evidence in making his proof, whereas at the first trial, the doors were wide open and both sides introduced any and all manner of evidence and *without objection or exception.*

The records for the two trials are totally different and the facts established are not the same as the attorney for the petitioner would have the Court believe.

POINT III.

Answering petitioner's Point I and reviewing the opinion of the Supreme Court.

Of the 14½ pages of the opinion of the United States Supreme Court, 9 are given to a review of the facts established at the first trial, and of the main defense interposed by the defendant. The reversal was based upon what the Court in its opinion entitled the chief (*first*) controversy between the parties which was

> "over the admission in evidence of the general (Government) contract, and the effect given to it in the rulings of the Trial Judge,"

namely, that the provisions of that contract be read into the sub-contract, between the parties,

and that any delays by the Government in suspending or stopping the work were not chargeable to defendant, and the defendant was not responsible to the plaintiff.

This was held to be error and *that part of the decision of the Supreme Court has not been raised in the present case* and was accepted by the Trial Court and by Trial Counsel as being the established law of the case. The question was not raised in the Circuit Court of Appeals. That subject covers one and one-half pages of the nine (pp. 10-11).

The *second* part of the opinion of the Supreme Court is an exception taken to the instruction by the Trial Justice to the jury that

> "even if there was delay in furnishing granite, there would have been no liability under the subcontract for such delay in money, but such a condition was to be remedied by *an extension of time* for completion as therein provided."

The Supreme Court held that Par. 11 bound

> "defendant *to reimburse plaintiff for any loss caused by delay* resulting from defendant's failure to provide materials not included in the sub-contract. The granite was in this category. The Trial Court misapplied Par. 7."

This point, decided by the Supreme Court, was not raised at the trial nor before the Circuit Court of Appeals. Throughout the trial and the appeal, the defendant's position has been that the defendant was liable to reimburse the plaintiff *"for losses attributable to delays."*

The *third* question or matter decided by the Supreme Court in its opinion is that an error was made in the instruction of the Trial Court

> "that under Par. 7, plaintiff was not entitled to recover damages or money compensation from defendant even though it should appear that plaintiff was obstructed or delayed in the persecution or completion of the work by the neglect, delay or default of the Government, * * * or by defendant, or by alterations required in the work, since by the provisions of that paragraph, the only remedy of plaintiff is *the time allowance therein provided.*"

That question was not raised at the trial or in the appeal to the Circuit Court of Appeals. Neither the Trial Judge nor the Circuit Court have held any such thing. On the contrary, both the Trial Judge and the Circuit Court of Appeals have held distinctly that under Par. 11, if the defendant did not

> "provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the subcontractor, that the *plaintiff should and must reimburse sub-contractor for such loss incident to the delay.*"

The Circuit Court of Appeals holds no differently, and nothing in the opinion of the Circuit Court of Appeals contravenes the law as laid down in the opinion of the Supreme Court, and both the Trial Judge and the Circuit Court of

Appeals have firmly and truly held that *"Par. 11 must be enforced as it is written."*

The *fourth* point of law decided in the opinion of the Supreme Court, is with respect to *prospective profits.* Neither the Trial Court nor the Circuit Court of Appeals have held anything contrary to that part of the opinion of the Supreme Court. The Supreme Court held that the profits were not *contingent and speculative,* and both Courts have held, the Trial Court in its instructions to the jury, and the Circuit Court of Appeals in its opinion (p. 13), in its statement of the measure of damages for breach, held that

> "The plaintiff was entitled to recover, if at all; * * * also the profits that it would have realized from performing the contract."

This law as laid down by the Circuit Court of Appeals certainly does not conflict in any manner with the opinion and decision of the Supreme Court.

The *fifth* question of law determined by the Supreme Court *was whether or not it was error to refuse an instruction.*

> "If you find that the defendant failed to make payments as called for by the contract, such failure constitutes a breach of the contract, * * * and justifies the plaintiff in stopping the work, * * * and entitles it to recovery from the defendant of such damages as may be proper on the evidence and under the instructions which the Court will give to you * * *."

The Supreme Court said, "in this state of the record, we cannot say that there was error in

the refusal of the requested instruction." The Court also pointed out that the contract did not specify the amount of the advance payments or indicate how they were to be ascertained, and the Court sets forth that the language of the contract required the general contractor (the defendant) to make substantial payments monthly, fairly approximate, but not exceeding 85% *of the cost of the work,* but that the plaintiff's subcontractor was not to be the sole judge of the amount it was entitled to receive; that the provision evidently contemplated that the defendant was to be afforded an opportunity to verify the propriety of the demand made. The Supreme Court further points out that the evidence failed to show that the requisitions *were based upon the cost of the work.* The contract required payments in current funds in monthly payments on account, not to exceed in amount *85% of the cost of the work actually erected in the building, on a written requisition.* The contract further required that the work should be performed and finished in a thoroughly workmanlike manner *under the direction and to the satisfaction of the Government architect.* There was no proof whatever in the case that the work was done to the satisfaction of either the defendant or the Government architect, but there was evidence to the contrary, that the work was not to the satisfaction of either the defendant or the architect (Record, pp. 301, 294).

The Supreme Court further points out that the last requisition of March 9, 1912, stated "amount of work completed to date, $18,237," but such details as were furnished do not seem to bear out this estimate. "In the state of the record, we cannot say that there was error in the refusal

of the requested instruction." The counsel for plaintiff-petitioner states that the record is substantially the same as heretofore. Certainly the same requisition was introduced from March 9, 1912, and if so the details furnished do not seem to bear out the statement. The decision of the Circuit Court of Appeals does not in any way conflict *with the language or intendment of the opinion of the Supreme Court* with respect to the requisitions by the plaintiff on the defendant, nor the want of compliance on the part of the plaintiff with which the provisions for monthly 85% payments. The Supreme Court in its refusal to hold the request to instruct the jury error has merely pointed out what the proof in the first trial lacked to warrant the plaintiff in asking for the instruction, which was refused. The Supreme Court pointed out some things that were wanting or lacking in the plaintiff's case, *rather more than what would be sufficient at a later trial.* Petitioner's counsel, in its brief, evidently assumes that if he supplied what the Supreme Court pointed out was lacking, in his requisitions for 85% payment, he then had a clear pathway to recovery.

The *sixth* point of law determined by the Supreme Court in its opinion, is that the Trial Court's refusal to instruct the jury as to *the measure of damage,* was not error for the reason that some of the elements indicated in the request *would not be properly applicable,* and that the form of the request was such that compliance with it might have mislead the jury and hence there was *no error in refusing it.*

With that warning, that some of the elements indicated in the request were not applicable, and that if the instruction had been given, it might

have misled the jury, plaintiff's counsel asked the Court to instruct the jury in precisely the same language *under the same pleadings or grounds of action,* namely,

(a) Failure to provide granite blocks prior to October 16, 1911 (Complaint, Par. 5, fol. 24);

(b) Failure between that date and March 19, 1912, to provide necessary materials and carry on its part of the construction work (Complaint, Pars. 6 and 7, fols. 25-8);

(c) A *quantum meruit* for labor performed and materials furnished (Complaint, Par. 12, fols. 30-1).

And now when the Circuit Court of Appeals has practically rehearsed the language of the Supreme Court, namely,

> *"The trouble with the instruction is that it embodies a duplication of elements and is misleading,"*

he seeks a writ of certiorari and wants the judgment of the Circuit Court of Appeals reversed and set aside, and he bases this petition for a writ of certiorari on a dicta preceding the statement of the law to the effect that

> "Had the requested application of these elements of damage *been confined to the case* of plaintiff being found entitled to recover upon the theory that the contract was rightfully terminated by the notice of May 22, 1912, we assume it ought to have been granted."

But the case has been retried with all the elements or grounds of action which the Court pointed out rendered the request inapplicable, and this Court said might have misled the jury. The trouble with the petitioner is that he *has not confined his case* to the theory that the contract was *rightfully terminated* by the notice of May 22, 1912, and he cannot establish his right to recover upon that theory for the reason that the contract could not have been rightfully terminated by the notice of May 22, 1912, under the terms of the contract, and *when he was under specific orders from defendant to proceed with his work,* under date of February 3, 1912 and April 3, 1912 (Exhibits X and P, pp. 439, 455).

The plaintiff made several amendments to his complaint (Record, fols. 81-9), and finally during the trial he made further amendments after the decision of the Supreme Court to meet some of the several criticisms embodied in the Court's opinion (Record, pp. 46-50), but he nowhere expunged the objectionable and multifarious pleadings, nor did he anywhere elect upon what ground he sought to recover.

The plaintiff attempted to straddle several causes of action, so as to be safe.

If the Court held that the "termination" of a contract was a *rescision* of the contract, he would still have his common counts or *quantum meruit* to stand upon, under the *"U. S.* v. *Behan"* case; and if the Court held that "to terminate" meant an election to treat the contract as breached, then he (it) would be safe under an action for a breach of contract and prospective profits. However by plaintiff's failure to amend its complaint and to bring its action upon *one* instead of *several* grounds, it failed to meet the objections pointed out by the Supreme Court in its opinion.

Plaintiff offered proof of its *quantum meruit* and it was admitted over the repeated objection of defendant's counsel.

Defendant pointed out at the close of plaintiff's case that recovery was limited to *quantum meruit* when the contract was terminated or rescinded (Record, p. 220).

The Judge's charge plainly indicated that he too had in mind the *quantum meruit* counts, for he states that "the remaining question would be the one of damage, and as I stated, that is mainly one of reimbursement" (fol. 1119), and further that,

> "In estimating the recovery to which the plaintiff is entitled, * * * you can consider the reasonable expenditures incurred, the unavoidable losses incident to stoppage; the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract."

Opinion of Circuit Court of Appeals.

The opinion of the Supreme Court reported in 240 U. S., 264, was very carefully reviewed in the opinion of the Circuit Court by Bingham, J., in which he sets forth very fully and completely the points of law determined and errors passed upon by the Supreme Court. If the learned Justice had anticipated this motion for a writ of certiorari he could not have been more careful and explicit in reviewing the opinion of

the Supreme Court and in setting forth explicitly by number and in the language of the record the objections and exceptions and the assignments of error upon which the opinion was founded and the judgment reversed, and the Court has very carefully set forth the charges of the Trial Judge and his refusal of the defendant's requests to charge, carefully enumerating the assignment of errors with respect thereto and has then stated carefully and consistently the opinion of the law in which the errors were made by the Trial Judge. It is the belief of defendant's counsel that the Court will find a complete answer to this motion for a writ of certiorari in the opinion of the Circuit Court of Appeals.

In conclusion as to Point I of plaintiff's brief, defendant submits that the Supreme Court in its opinion and decision was passing upon objections and exceptions to the rulings of the Court or to its charges or refusals to charge, to the end and for the purpose of determining whether or not errors had been made, and that the Supreme Court in its opinion and decision was not acting as professors of law, to tell the plaintiff how it could prepare its pleadings and try its case to effect a recovery. One would think from the brief that the plaintiff's counsel had misconceived the duties and office of the United States Supreme Court and that he had taken many things for granted under his favorite expression of 'the intendment of the decision."

POINT IV.

Answering petitioner's Point II.

The decision of the Circuit Court of Appeals is entirely in accord with the opinion of the Supreme Court as to the measure of damages for delay.

The Supreme Court held and recited in its opinion that "the reference in the sub-contract to drawings and specifications was evidently for the mere purpose of indicating what work was to be done and in what manner done" * * *; that "the reference to the drawings and specifications was for a limited purpose, but the sub-contract by the expressed terms of its 11th paragraph placed upon the general contractor (defendant) the obligation to provide all labor and materials not included in this contract, in such manner as not to delay the material progress of the work * * *; that, therefore, held that the general contract was not admissible in evidence against plaintiff, * * * and that the rulings of the trial judge holding plaintiff bound by the provisions of the general contract so as to be obliged to submit to delays resulting from the action of the government were erroneous."

The court further held that "another point * * * raised by an exception taken to the instruction that even if there was unfurnished granite, there could have been no liability under the subcontract for such delay in money, but such a condition was to be remedied by an extension of time for a completion as therein provided. This was clearly erroneous. Paragraph 11th binds defendants to reimburse plaintiff for any loss caused by delay resulting from defendant's failure to provide ma-

terials not included in the sub-contract. * * * It cannot properly be construed to deprive him (plaintiff) of *his right under Paragraph 11th to* reimbursement for losses attributable to delays assumed by the general contractors."

This Supreme Court further held that "the failure to furnish a foundation upon which the plaintiff's work could be superimposed, was a failure to provide labor and materials not included in this contract within the meaning of Paragraph 11th. * * * This not having been done, *Paragraph 11th must be enforced as it is written* * * * It must be presumed that delays attributable to action by the government were among those intended to be safeguarded by Paragraph 11th."

If the above language is not squarely and fairly a decision by the Supreme Court that *the contractor's measure of damages for delay in furnishing foundations or other labor and materials not included in the contract,* it would be difficult to find any language that could satisfy and convince the plaintiff's counsel. The Court has said over again and again several times what the rights of the plaintiff were for delays by the contractor in furnishing foundations or labor and materials, and *those are all the delays* that were *complained of by the plaintiff* at the trial.

The contract having provided and the Supreme Court having ruled that the plaintiff's recovery for delays was under the terms of the contract, Paragraph 11th, *to be measured by the losses attributable to delays* as were provided therein, the plaintiff was limited to the measure of damages fixed by the parties to the contract, which anticipated delays and the parties in contemplation of those delays *had determined what should be the measure of the plaintiff's damages, by reason of those delays.*

With that in view, the Circuit Court of Appeals held that the delays proven and shown at the trial and *those delays specifically defined and described in the contract as being within contemplation of the parties* or "that delays occasioned to the plaintiff by the owner, the general contractor, or by alterations which might be required in the work, were not to excuse the plaintiff from going on and completing the contract, but were to operate as an extension of the time, or were not to be considered in computing the time within which by the terms of the contract the plaintiff was required to perform its work." The Circuit Court further says, "Although the defendant was *to be responsible to the plaintiff in damages for such delays, provided they interfered with the material progress of its work,* we are, nevertheless, of the opinion that the plaintiff was not justified in view of the provisions of Paragraph 7th, in declining on this account to go on and complete the contract, and that the jury would not be warranted in finding from the evidence that the plaintiff was prevented from completing the contract within the time specified. The Court erred in refusing this (the defendant's) request."

Now, it is submitted that the evidence of the second trial was not the evidence before the Supreme Court and that the Circuit Court of Appeals, after a careful review of the evidence at the second trial, was fully justified in holding and determining that the plaintiff was not justified in declining to go on and complete its contract, and that the jury were not warranted in finding that the plaintiff was prevented from completing the contract within the time specified.

What the plaintiff has been able to find by a comparison of the two opinions upon which to

base Point II, he does not set forth, and *he fails to draw,* we may say, *any deadly parallel,* or *even make a comparison of the two opinions,* which will warrant the declarations made by him under Point II. What the Supreme Court held, namely, that *Paragraph 11th must be enforced as it is written,* is precisely what the Circuit Court of Appeals has held that "the defendant was to be responsible to the plaintiff in damages for such delays."

If the Supreme Court can take the time to compare the records of the first trial and the second trial, it will see that the facts proven at the first trial were not the facts proven at the second trial; that as has been said before the defendant challenges this statement of plaintiff's counsel in his brief. The evidence at the second trial was greatly restricted and limited by the trial court.

Defendant's counsel would further point out to the Court that *throughout the record there is not one single instance of delay to plaintiff's work shown or proven;* that the statements made by defendant's trial counsel on its motion to dismiss at the close of plaintiff's case (or for a direction of verdict in favor of defendant, Record, pp. 212-13). There was no evidence whatever of any delays for any definite period between any definite dates, nor any tangible evidence by which the jury could find any period of delay, or by which the jury could separate the delays caused by the plaintiff and those caused by the defendant. Throughout the trial and in its brief defendant's counsel challenged the plaintiff to designate or specify a single instance wherein there was any proof of any specific delay prior to March 8th, 1912, when the work was directed to be stopped by the government's representative. Between March 8th and

May 22nd, no work was done and the contract was terminated by the plaintiff on May 22, 1912, and the Court excluded any testimony of any events or acts of the parties after May 22nd, 1912. The testimony shows that from Feb. 23, 1911, until October , 1911, the plaintiff had two or three men at San Juan, P. R., who were getting ready, making forms, moulds, etc., and doing custom work for residents of San Juan, but no work whatever on the contract, there being no provisions for payment for false works, moulds, models and forms.

The fact that the plaintiff had and retained two or three men in Porto Rico was no ground for charging the expense thereof to the defendant.

The evidence also shows that when plaintiff received its notice on Jan. 10, 1911, by a telegram, that it was perfectly well understod between the plaintiff and the defendant that no work could be done upon the building until the foundations were ready, which would be in September or October, and the contract specifically provided that the plaintiff's work should not commence until *"the building is ready to receive his work and after he has been notified to proceed by the general contractors"* (Record, p. 15). When plaintiff's officers and men arrived at Porto Rico, it was perfectly evident that it would be months before any work could be done by the plaintiff upon the building, and he knew, as well as the defendant, what the situation and conditions were at the site of the building.

This, however, is going into the merits of the case, for which defendant apologizes, being led into it by plaintiff's brief. Defendant does not understand that the Supreme Court will take up and go into the merits of the case, but only to

consider those points upon which a writ of certiorari will be granted.

Subdivision A of plaintiff's Point II comprises two pages of the Supreme Court's review of the testimony at the first trial, and which cannot have any application to the evidence adduced at the second trial. Defendant's counsel then quotes what the Court held, "That Paragraph 11th imposed on the general contractor an obligation to provide all labor and materials not included in the sub-contract in such a manner as not to delay the material progress of the work," but defendant's counsel omits what follows and the measure of damages which the Supreme Court outlined and applied. Instead he talks about *the absolute breach of this absolute obligation* and the ordinary rights and remedies should arise. The Supreme Court did not hold anythng with respect to them whatever. That comes from the mind and heart of defendant's counsel. He says, "The fact that plaintiff had the right to reimbursement for losses attributable to delays, does not deprive him of his ordinary remedy to terminate his work *for defendant's absolute breach.*"

However, there was no *absolute breach,* and the Supreme Court has no where held that there was, or that there even might have been. On the contrary, the measure of damages pointed out by the Supreme Court for delays was under *Paragraph 11th.* He says on page 279 "The Court holds that Paragraph 7th did not cut off plaintiff from the right to recover damages or money compensation, even though some delays may have been caused by alterations required by the U. S. Government." Surely not. The Court expressly held that plaintiff was entitled to recover his losses under *Paragraph 11th.*

The other points made by plaintiff's counsel have been quite fully covered by what precedes, particularly in respect to the measure of damages under the "Behan case."

The argument of defendant's counsel (p. 24, Mid.), as to what the Supreme Court had before it and fully considered is quite true, except that *the Supreme Court did not apply the measure of damages stated in the Behan case,* but on the contrary, expressly stated *that it did not apply;* that it was misleading where there were several causes of action. The Supreme Court did not hold any such thing, as the plaintiff contends for, *"that defendant had been guilty of an absolute breach* of its contract, justified plaintiff to refuse to proceed with its work."

The Supreme Court passed upon the question of anticipated profits only in determining whether or not an error had been committed by the Trial Court. The defendant's counsel may tell the Supreme Court what it clearly had in mind in discussing the measure of damages, but the Circuit Court of Appeals and defendant's counsel can only determine what the Supreme Court had in mind *by what it expressed in its opinion,* and certainly the Circuit Court of Appeals has not closed its eyes to the obvious intent and purpose of this Court (Plf's brief, p. 25, Top).

How plaintiff's counsel can say that the Supreme Court was pointing out for the benefit of the trial judge and counsel the proper measure of damages to be applied is beyond comprehension, when the Supreme Court specifically and expressly recites that the measure of damages requested in plaintiff's charge under the Behan case "would not be properly applicable. The form of the request was such that compliance with it

might have misled the jury, and hence there was no error in refusing it." The language of the Supreme Court in respect to this matter of damages is mere *dicta* as it is applied to an academic case where the elements of damages were confined to a case of plaintiff being found entitled to recover upon the theory that the contract was rightfully terminated. Even then the Court says *"We assume it ought to have been granted,"* which would seem to indicate that the Court had not given it such consideration and study as to unqualifiedly say that the request should have been granted. All of the grounds of action, which the Court points out as forbidding such an instruction, were retained in the second trial and in the complaint, no election was made of the several remedies or grounds of recovery.

Defendant says that the Circuit Court of Appeals gave practically two whole days listening to the argument of this case; that the opinion of the Court shows that the case was studied with great care and true discernment, and defendant feels and believes that the Circuit Court of Appeals fully understood the purport and meaning of the Supreme Court's ruling on the first trial, and that it has applied faithfully those principles to the appeal from the judgment of the second trial.

Plaintiff's Subdivision B, Point II.—The defendant does not understand that the U. S. Supreme Court will listen to an appeal based upon an error of a fundamental law or of contract construction independent of any holdings or rulings of the Supreme Court, on a motion for a writ of certiorari. It is defendant's understanding that the U. S. Supreme Court is not a Court of Appeals to review the decisions of the U. S.

Circuit Court, unless it manifestly comes within those cases which demand a writ of certiorari.

How plaintiff's counsel creates a concession out of request No. 19 (Record, p. 259) is difficult to conceive. Defendant is quite willing to admit here that *delays may be conceived as being so unusual and extraordinary* and such as could not have been contemplated or anticipated by the parties, that would constitute a breach of contract. Nobody would contend that plaintiff was required to wait five years for defendant to fulfill its part of the contract, but here was a delay only from March 9 until April 3, 1912, when plaintiff *received its specific orders to proceed with its work,* and when the work had been interrupted, not by the defendant, but by the government under express authority reserved in its contract and specifically mentioned, contemplated and anticipated by the plaintiff and defendant. The Circuit Court of Appeals held that on the evidence and under the terms of the contract it was error for the court to charge as requested by plaintiff. Plaintiff's counsel has lost the line of his argument and has forgotten, it is feared, what the Circuit Court of Appeals did decide and rule.

POINT V.

Answering plaintiff's Point III.

Sub-heading A.—Takes up a point of law which was not passed upon by the Supreme Court and which was raised in the second trial by trial court's charge and its refusal to instruct as requested by the defendant, as pointed out in

the opinion of the Circuit Court of Appeals. The ruling of the Court was fairly and squarely under the charge and the failures to charge instructions asked as pointed out specifically by the Court. The Court's charge was as to failure "to make payments on account of work done by the plaintiff and the request asked by the defendant;" that *"the delay of defendant to make payments on estimates* in the absence of the positive refusal to pay anything *was not ground for recision or termination of the contract* by plaintiff. The Court points out that the contract provides only for progress, payments for the concrete backing, concrete walls, concrete floors and concrete roof and *no provision* whatever is made as to payment *for setting granite* which was not in the original contract (Record, pp. 12, 18, 21). Moreover, as pointed out in the opinion of the Supreme Court the payments were to be based upon *the cost of the work* actually reckoned in the building. There is not one particle of proof that the *requisitions were founded upon the cost.* It appears, therefore, that the requisitions were not made in accordance with the contract, nor were they made in accordance with the opinion of the Supreme Court. The defendant has not at hand a copy of the record of the first trial, but the plaintiff's counsel says that the requisitions were the same in both records. If that be rue, then the plaintiff has not complied with the criticism of the Supreme Court in its opinon in the second trial any more than it did in the first.

There was no adequate proof that the parties had agreed upon a unit price covering the concrete work. It was shown that at the alleged agreed price per cubic foot, the plaintiff would

have received nearly double its total contract price for the concrete work in the building. It was further shown that there *was no consideration* for such an increased price for the concrete. The plaintiff's president said and reiterated at the trial that his *requisitions were made upon the basis of the contract;* that he did not demand or expect anything more than the contract provided for; hence, his requisitions *could not have been made upon another and different contract.* No secondary or supplemental contract was pleaded (fols. 496-8, 1178, 1195, Exhibits 18 and 24).

There is no application or requisition for payment under date of Feb. 27. Even in the brief, defendant's counsel does not argue or pretend that the application (Exhs. 18, 19, pp. 393-5) is for *the cost of the work as required by the contract.*

There is nothing in the opinion to show that the Circuit Court of Appeals "evidently was satisfied that the plaintiff had complied with the requirements of the Supreme Court." The careful consideration which the Supreme Court gave to the question of applications or requisitions was to determine whether or not an error had been committed and plaintiff's counsel cannot get over the feeling that the Supreme Court was endeavoring to instruct him how to prepare his case and how to present it, in order that he might recover. (Plf's Brief, pp. 28, 29.)

Plaintiff's Sub-item B.—Plaintiff here again seeks to have the Supreme Court review questions of fundamental law and contract construction not passed upon by the Supreme Court in its opinion on the first appeal.

Plaintiff's counsel says that the construction adopted by the Circuit Court of Appeals has never been suggested in the history of this litigation, etc., and he further states "no suggestion was made that the defendant objected to the requisitions on this ground. If the contract is to be so construed the defect is clearly waived." The Circuit Court of Appeals points out that *the defendant requested the Court to instruct* "that the delay of the defendants *to make payments on estimates,* in the absence of a positive refusal to pay anything, was not ground for recision or termination of the contract by plaintiff." Here is certainly more than a suggestion that the estimates were not proper and in accordance with the contract. Defendant further says by his exception to the Court's charge that "if you find that the defendants failed *to make payments* as called for by the contract, *not over 85 per cent. and not otherwise,* in pursuance of the contract *on account of work done by the plaintiff,* * * * such failure constitutes a breach of contract, * * * and that, justifies the plaintiff from stopping work * * * and entitled it to recover for damages." There again the defendant has complained of the charge of the Court that plaintiff was entitled to 85 per cent. on account of work done by the plaintiff.

Plaintiff's counsel says "finally the Circuit Court of Appeals seems to ignore the fact *that plaintiff's granite work under the contract was completed.*" The evidence shows that the granite work *was not completed.* The only evidence as to the completion of the work is (Record, p. 334), as follows:

"Q. Now, Mr. Carlin, this granite work which the plaintiff did; did they finish it?

A. They did not. They finished no part of the work. *They omitted the cleaning and pointing* and that is a very material part of granite work.

Q. Now, did they finish the concrete work?

A. They did not.

Q. What did they omit of the concrete?

A. *They omitted the surfacing.* After the forms were removed as this concrete was exposed to the basement, it had *to be surfaced and smoothed.*"

The specifications strictly require the matters and things which were not done (Record, pp. , 423, fol. 1268; page 426, fols. 1278-80). Furthermore, the work was to be done *to the satisaction* of the defendant and the government architect (Record, p. 12, fol. 35). *The work was not done to the satisfaction of either the architect or the contractor* (Record, p. 301, fol. 902; and p. 294, fols. 881-2). There is no further proof whatever that on March 9 "when plaintiff's last and most formal requisition was made the granite work was in fact completed, as far as plaintiff was concerned. It was no more completed then than it had been in Jan. or Feb. as far as the cleaning and pointing were concerned.

It would seem to defendant's counsel that this point decided by the Circuit Court of Appeals was not properly before the Court, the question not having been passed upon by the Supreme Court on the appeal from the first judgment.

POINT VI.

Answering Petitioner's Point IV.

Plaintiff's Point IV would seem to have been fully answered on what precedes. It would seem that the plaintiff's counsel was not yet straight on this question of law. He either fails or refuses to understand why and how the *"United States* v. *Behan"* measure of damages was adopted. It was a condition in which the ordinary rules for the measure of damages *could not be applied.* It has been cited repeatedly by the Court of Claims and by the U. S. Supreme Court and stands out as a special case for the measure of damages where the circumstances and conditions are such that there is no other measure, than to allow the party damaged *his expenditures in making preparations to do the work.* The case has no application to the case in point, for the reason that the erection and construction of a building is such a common occurrence, and the fair and reasonable price for the work so well determined that *the prospective profits can be easily determined,* as was held by the Supreme Court in its opinion on the first appeal.

The Circuit Court of Appeals in its opinion seems to have followed the law as laid down by the Supreme Court in the question of damages and the measure of damages. A further trouble with the measure of damages as outlined by the Trial Court was that it did not give it twice alike; that in its charges to the jury, it gave different measures of damages.

POINT VII.

Answering the Plaintiff's Point V.

As to admission of evidence and the amendment of the complaint.—Plaintiff offered evidence of a modification or amendment of its contract which it did not plead, although it made amendments to its pleadings at the opening of the trial. Objection and exception were made to the admission of such evidence and error assigned.

The evidence or amendment was in the form of a schedule of prices, and defendant's counsel said, "I do object to it and to the conversation as immaterial, as being *an attempt to modify or alter a written contract* and as being *dehors* the terms of the contract and *there being no consideration* for any change or modification of the contract in this manner. *There is no pleading that the contract was modified or altered or changed. It is not within the pleadings.*" * * * It seems to me you cannot here modify, alter and change and add to a contract and change the means and methods of payment unless it is pleaded and unless there is a consideration. (Record, p. 97).

> "COURT: Objection is overruled.
> MR. WAIT: Note an exception.
> THE COURT: The paper is admitted."
> It was marked *Exhibit 14.*

Certainly plaintiff's counsel had ample notice of the objections by defendant and deliberately neglected and refused to amend his pleadings then and there which perhaps might have been

done. He now seeks to avoid the situation by declaring that it *was not a modification* of the contract,—an extraordinary view.

There is no doubt but what parties may agree to modify a contract and to change their prices, if there were any change in the work, or any consideration for such damages, but here was none, but the plaintiff attaches a contract to its pleadings and seeks to recover upon another and different contract and over the objection and exception of his opponent. How can plaintiff's counsel say that defendant was not surprised or prejudiced by the introduction of this testimony without an amendment? There is nothing to show, and in fact, it is the truth that defendant's counsel never saw the record of the first trial at the time that he started the trial of this case. The statement by plaintiff that "because all of the testimony was put in at the first trial without objection by the defendant," shows that the testimony and proof at the second trial were not the same, but very much restricted and limited; but furthermore objections were made and exceptions taken to testimony that was introduced and admitted. It is sufficient that defendant raises its voice and objects to the admission of improper testimony and specifically states the grounds without regard to what has been done on prior trials.

The second *Point B* reviewed by plaintiff's counsel is *the error in the admission of evidence as to the reasonable value of tools, etc.* The Court held that *the action should have been one of conversion* and *not an action on written contract* and that the evidence was wrongfully admitted. The plaintiff would not seem justified in raising this point on this motion, but sug-

gests to the Court what should be done in the matter. By what rule or right, plaintiff seeks to instruct the Circuit Copurt of Appeals in its practice or opinons or makes suggestons to the Supreme Court, plaintiff is not informed. The point is hardly worthy of consideration.

POINT VIII.

Answering plaintiff's Point lastly.

Plaintiff has found no grounds or reason why the extraordinary relief of certiorari should be granted on this petition. There are no peculiarities in the case that would warrant such relief. The Supreme Court has not passed on the whole case and the determination of the Circuit Court of Appeals is entirely in accord with the U. S. Supreme Court's opinion and decision. The plaintiff *has not been struggling to recover in this case* any longer than the defendant *has been struggling to defeat him.* The defendant's counsel has long been resident in the City of San Juan, Porto Rico; has a large and numerous acquaintance among the inhabitants and was intimately acquainted with some of the jurymen. How far this acquaintance and local residence contributed to the favor of the plaintiff, and how much it went to the detriment of the defendant, will never be known. But the plaintiff feels and declares that the judgment obtained in the District Court from a Porto Rican jury was most unjust and inequitable. The plaintiff recovered a judgment for $45,000 under a contract for $64,000 when it acknowledged that it had

had done *one*-quarter in quantity of the cheapest and poorest work, down in the basement (fol. 482), and when the work which it was required to do was a fine artificial sandstone front of a great federal building which was to house the U. S. District Court, the postoffice and the custom house and other federal offices. The plaintiff acknowledged that it had spent $35,000 more or less to accomplish less than one-quarter of the work (fols. 1146, 482), which would make the total work cost upwards of $140,000 (R., p. 153), and for which his contract price was only $64,000 (R., p. 153), and in spite of that the testimony of the president of the plaintiff was to the effect that he would have made $9,000 profit on the work (fol. 332).

The statement by plaintiff's counsel that the verdict corresponds with the amount proved to have been laid out—without anticipated profits—plus interest, was made at the oral argument before the Circuit Court of Appeals, and he was asked *how he knew that the jury gave anticipated or prospective profits,* and he conceded that he could not tell and did not know; yet he reiterates that statement to this Court.

There is no misconception of the law in this case, and justice requires that the wrong done to the defendant by giving a judgment of $45,000 under the circumstances and facts of this trial, should be righted.

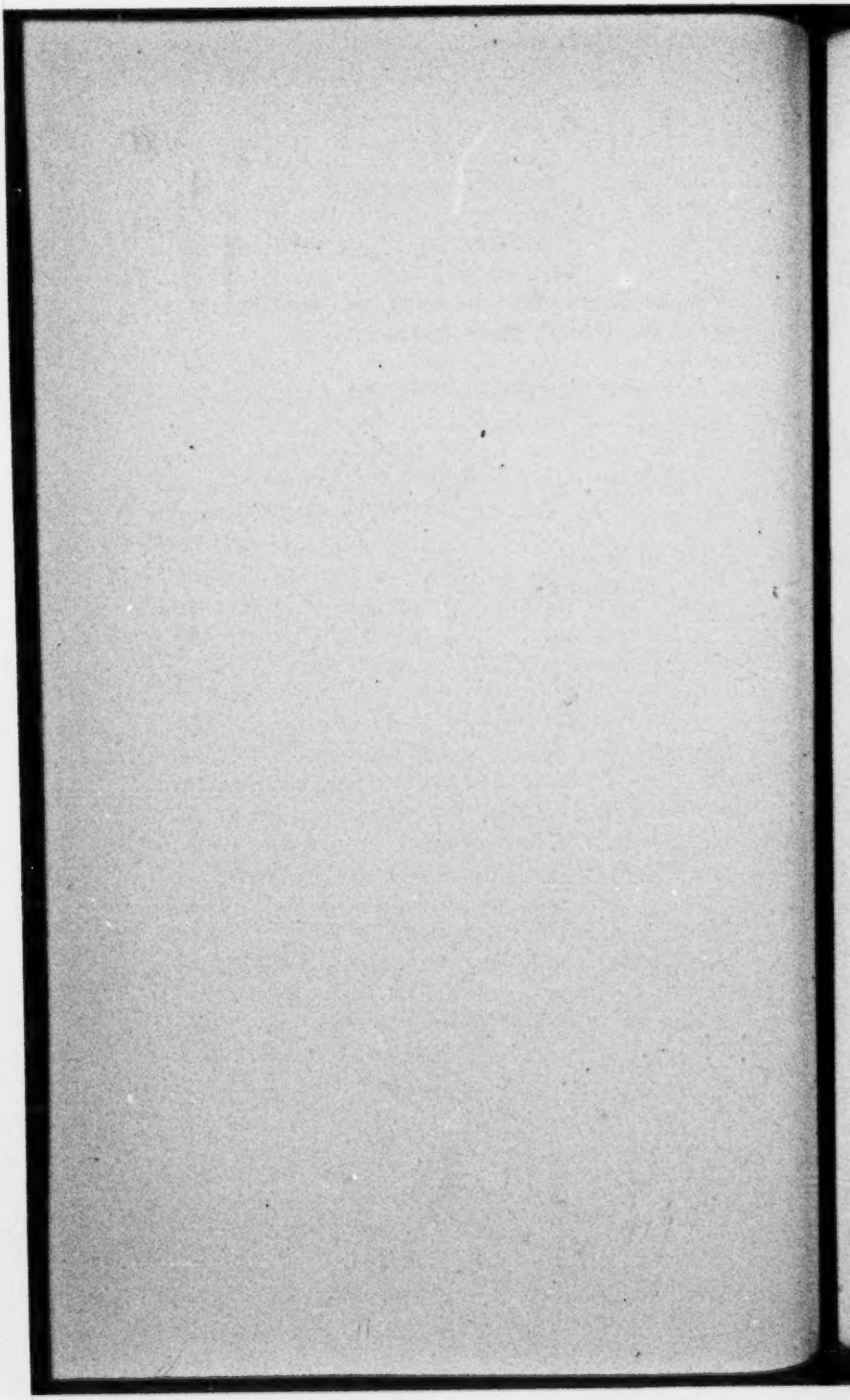
POINT IX.

The petition for a writ of certiorari should be denied, with costs.

Respectfully submitted,

CHARLES HARTZELL,
Attorney for Defendant,
San Juan, Porto Rico.

JOHN C. WAIT,
Of Counsel.



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No. 218

Office Supreme Court, U. S.
FILED
SEP 24 1918
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM 1917.

GUERINI STONE COMPANY,
Petitioner,

against

P. J. CARLIN CONSTRUCTION COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

EDWARD S. PAINE,
Attorney for Petitioner.

EDWARD S. PAINE,
EUGENE CONGLETON,
of Counsel.

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Supreme Court of the United States

October Term 1917.

GUERINI STONE COMPANY,
Petitioner,
against
P. J. CARLIN CONSTRUCTION COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Preliminary Statement.

The case is in this Court on writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted by this Court on October 10, 1917. The suit was at law brought in the District Court of the United States for Porto Rico by the petitioner, Guerini Stone Company, a Massachusetts corporation against P. J. Carlin Construction Company, the respondent, for damages sustained by the plaintiff by reason of the breach by the defendant of a contract between the parties. The

suit was begun by the filing of a complaint on January 18, 1912. The case was tried before a jury and a verdict was entered in favor of plaintiff under date of November 16, 1912. From the judgment entered on this verdict both sides appealed to the Supreme Court of the United States, which at that time had appellate jurisdiction. Prior to the argument before the Supreme Court the defendant below dismissed its appeal. The plaintiff prosecuted its appeal on the ground that its recovery below was unduly limited by reason of the manner in which the case had been submitted to the jury by the trial judge. The appeal was argued on November 12, 1915, and on February 21, 1916, the Supreme Court handed down its decision, Mr. Justice Pitney delivering the opinion of the court (240 U. S., 264). The decision of this court sustained the plaintiff's contentions, set aside the judgment and remanded the case with direction that it be tried anew in accordance with the principles established in the opinion. The opinion, which covered nineteen pages of the report, contained a full summary of the facts and went thoroughly and fully into the fundamental questions of law involved in the case.

In the latter part of May, 1916, the case came on for its second trial before the District Court of the United States for Porto Rico, and after a trial lasting over a week, the jury on June 8, 1916 brought in a verdict in favor of the plaintiff for the sum of $44,482.63, for which sum judgment was entered.

The defendant thereupon sued out a writ of error to the Circuit Court of Appeals for the First Circuit (appellate jurisdiction from the District

Court of the United States for Porto Rico having been conferred upon that court in the meantime). The Circuit Court of Appeals on April 2, 1917, reversed the judgment of the United States District Court for Porto Rico, set aside the verdict and remanded the case for a new trial in accordance with the opinion rendered. Thereupon the petitioner applied to this court for a writ of certiorari upon the ground that the Circuit Court of Appeals had failed to follow the rules of law laid down by this court upon the first writ of error and that its mandate to the District Court of the United States for Porto Rico remanding the case to that court for further proceedings not inconsistent with its opinion was inconsistent with the mandate given by this court when the case was before it on the first writ of error.

Facts.

The defendant, P. J. Carlin Construction Company, a New York corporation, on December 12, 1910, secured a contract with the Government of the United States for the construction of a post-office and court building in San Juan, Porto Rico. Shortly afterward defendant entered into a sub-contract in writing with Mr. A. Guerini, whereby Guerini agreed to construct the shell of the building, that is the concrete walls, floors and roof (Clause 1st of the contract, page 6) and also agreed, at the option of the defendant general contractor, to set in position all the granite walls and other granite work on the building (Clause 25th of the contract, page 11). The sub-contractor had nothing whatever to do with the construction of the

foundations of the building, nor with the furnishing of the granite, the structural steel, fittings, etc. The sub-contractor's work was to begin after the defendant had constructed the foundations of the building up to the basement floor level.

The contract further provided that the sub-contractor should wholly finish its work within 300 days from the date upon which the building was ready to receive his work and after he had been notified to proceed by the general contractor (Clause 6th of the contract, page 7).

The contract furthermore provided that "the general contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work and in the event of failure so to do, thereby causing loss to the sub-contractor, agree that they will reimburse the sub-contractor for such loss (Clause 11th of the contract, page 9).

The contract also provided that the price to be paid by the general contractors to the sub-contractor should be $64,750, which sum was to be paid "in monthly payments on account not to exceed in amount of 85% of the cost of the work actually erected in the building, provided that said contractor furnishes to the general contractors a written requisition, on a form to be supplied by the general contractors not less than twelve days before the payment is required" (Clause 12th of the contract, page 10).

After obtaining the contract Mr. Guerini applied to Mr. H. P. Converse, of H. P. Converse & Company, an established contracting concern in Boston, Massachusetts, and arranged with Mr. Converse that a corporation should be formed by them

to take over the sub-contract and do the work under it. The corporation was formed under the name of Guerini Stone Company and the contract assigned to it, and this assignment was consented to in writing by the general contractor (Plaintiff's Exhibit 6, page 282).

Under date of January 10, 1911, the defendant notified the plaintiff by telegram that "work must start at once" (Plaintiff's Exhibit 7, page 282). On receipt of this telegram Mr. Converse went to New York and interviewed the representatives of the general contractor. At that interview Mr. Converse was told to go to Porto Rico and begin the work (Record page 64). Thereupon plaintiff sent representatives to Porto Rico and on the 18th day of February, Mr. Converse, the President of plaintiff corporation, together with Mr. Follett, sailed for Porto Rico, arriving on the 23rd day of February. When they arrived they found that the foundations were only started and had not been brought to a point where the work under the sub-contract could be begun. The defendant had a few men working digging trenches for foundation footings and had placed at most a very small amount of concrete in the foundations. There was nothing the sub-contractor could do on the building (page 22). On their arrival plaintiff's representatives expected to put in two or three weeks in preliminary work and expected they might be called on to go to work in about a month, thinking that the foundations at one end of the building would then be in condition so that a start could be made (page 23). They set up their office and shop and store sheds and Guerini and two or three molders started in making the molds which were to be used in connection with

certain ornamental pieces of cast concrete to be used on the exterior of the building (page 23).

However, in January, 1911, the defendant proposed to the authorities in Washington a change in the type of foundations, suggesting that the pile under-pinnings of the foundations be omitted and spread footings be substituted (page 230) and these negotiations continued until May (page 235). As a result it was July before the foundations were ready to receive granite (page 24). But defendant did not exercise its option to call on plaintiff to set the granite till about the middle of September (page 23). The granite course was the next step after the foundations, and it was above this granite that plaintiff's work on the main concrete work, the walls, floors and roof, was to begin.

About September 15th the defendant exercised its option to have the plaintiff set the granite, and work was started on the 12th or 13th day of October, at which time enough granite had been delivered on the site to make a start (page 23), but there was some little trouble the first two or three days and the first actual work was begun about the 16th day of October. Plaintiff continued setting the granite from the 16th of October until the 12th day of February, at which time they ceased setting granite by mutual agreement with the Carlin Company (page 24). Defendant furnished the granite and it arrived in Porto Rico in instalments. At the time when plaintiff began setting the granite only a very little was on the site (page 24) and only a part of the granite was in Porto Rico. It came along in several different shipments thereafter. The stones were cut at the quarry according to plans and numbered so that each piece had a proper place

in which it was intended to be set. The pieces were not delivered in consecutive order (page 24). The largest shipment arrived in San Juan on the 11th day of January (page 171). The dates of arrival in Porto Rico of cargoes of granite and the number of pieces in each shipment according to defendant's witness were as follows (page 171):

August 12, 1911, 136 pieces.
September 22, 1911, 317 pieces.
December 6, 1911, 164 pieces.
January 11, 1912, 433 pieces.
March 13, 1912, 20 pieces.
April 13, 1912, 1 piece.

Plaintiff claimed that the earlier shipments were largely not delivered *on the site* till after October 2nd and put in evidence (page 186) two photographs to prove this fact (Pls. Ex. 28 and 29, page 294).

Plaintiff set the granite as fast as it came (page 60) and finished setting all the granite that had arrived and could be set by the 12th of February, 1912 (page 25). The granite setting was practically finished on January 25, 1912, when the new government superintendent arrived at Porto Rico (page 138). See also cross examination of defendant's witness and Mr. Wait's admission (page 188).

Up to the time in February when plaintiff stopped setting the granite the only concrete work which plaintiff had been able to do was the concrete backing to the granite and some concrete on the foundations on the north wall, together with some of the interior partition walls and some of the casings of the steel columns. This was all the

concrete work that the condition of the building allowed plaintiff to do up to that time (page 25). After finishing the granite setting, concrete work was continued on the interior basement walls and very shortly after the first floor slab was started (page 25). Concrete work then continued until the 9th of March, 1912.

Toward the end of February, 1912, Mr. Berryman, the new government superintendent of the building, who was sent to replace his predecessor, Mr. Stierle, and who had arrived on January 25th, 1911, determined that the foundations were settling (page 139). On March 9, 1912, plaintiff was notified by defendant that the work was to be stopped (pages 26, 199) and after that time plaintiff did no work on the building.

There followed an exchange of correspondence between plaintiff and defendant, plaintiff claiming that defendant was responsible for the delay resulting from the stoppage of the work and defendant claiming that there would be caused only about two weeks' delay (Defendant's Exhibit P, page 317). On April 25th plaintiff, claiming that it would be justified in terminating the contract, offered arbitration (Plaintiff's Exhibit 24, page 290). In the meantime plaintiff's superintendent had determined that it would be at least five months before any work could be done by plaintiff on the building.

Work having been stopped on March 9, 1912, Mr. Follett, plaintiff's superintendent, remained in Porto Rico until about the 1st of July, 1912. At that time work had been started by defendant on repairing the foundations. This work began about four or five weeks after the suspension, after the

investigations were made. The witness came to Porto Rico in the middle of November of that year eight months after the stoppage and at that time the repairs to the foundations had not been completed, so that plaintiff would have been able to proceed with its work under the contract (page 27). At the time plaintiff's superintendent sent his men north in April, from his experience and from his knowledge of conditions on the site he was able to form an estimate as to how long it would be before his company would be able to continue work on the building. He estimated five months. It turned out to be seven or eight months (page 27).

In the meantime plaintiff had been endeavoring to get some payment from defendant for the work actually done by plaintiff under its contract. Under date of December 19, 1911 (Plaintiff's Exhibit 10, page 283), the plaintiff wrote the defendant asking for its blank forms of application for payments, and under date of December 20th twelve blank forms were sent by defendant to plaintiff (Plaintiff's Exhibit 11, page 284). One of these blank forms is printed in full as Plaintiff's Exhibit 12, page 284). Under date of December 30th plaintiff made application on one of these blank forms for $5,654. In this application the items called for were filled in, the 15 per cent. reserved was deducted and application was made for payment for 2,473 square feet of granite at the contract rate (Plaintiff's Exhibit 13, page 284). On January 30th, pursuant to a request by defendant, plaintiff wrote defendant sending corporate authorization to make payment by handing checks to Mr. H. P. Converse and stating that Mr. Converse would call at defendant's office on February 1st.

Various informal letters were sent by plaintiff to defendant requesting some payment and the president of plaintiff company on or about February 1, 1912, went to New York and had an interview with the defendant. He obtained a check for thirty-seven hundred and odd dollars with which he was dissatisfied (page 66).

Plaintiff having difficulty in obtaining any money whatsoever, although having been under heavy expense and having actually put a substantial amount of work into the building (for which defendant was actually collecting from the government), it became apparent that for practical purposes some basis must be arrived at whereby payment for work done could be applied for with results.

Mr. Converse insisted on this at this interview, on or about February 1, 1912, and according to his testimony it was definitely agreed at that time between him and Mr. Carlin that if an application should be made on the basis of $1.07 per cubic foot of concrete, payment would be made on that basis. Mr. Converse swore that Mr. Carlin dictated and gave to him a written memorandum which was put in evidence (page 67, Plaintiff's Exhibit 14, page 285), giving items as follows:

> "Schedule of Amounts Covering Each Branch of the Work in Construction Post-office and Court-house Building at San Juan, P. R.
>
> 1. Excavation and filling, $9,000.00; $1.50 and 60c. per cu. yd.
>
> 2. Concrete footings and walls to basement level, $18,000.00; 50c. and 35c. per cu. ft.

3. Exterior and interior concrete walls, arches and cement work, $48,000.00; $1.07 per cu. ft.

4. Concrete floors and casings, $37,500.00; 45½c. per sq. ft."

The last two items applied to the work done by plaintiff and were the units on which the government had been paying defendant for plaintiff's work (pages 211, 240).

Mr. Carlin denied that any agreement was made at that time that payment would be made if the application were based on this unit price, although he admitted that the memorandum was handed to Mr. Converse under his instructions. Mr. Converse's version was substantiated in many ways (see Plaintiff's Exhibits 17 and 18, pages 286, 287) and Mr. Carlin's version of the conversation was definitely shown to have been clearly impossible in one respect at least by his cross examination. It was conceded that payment had been made by the government to the defendant for the work done by plaintiff on this same basis of $1.07 per cubic foot. Mr. Carlin, to show that it was unlikely that he should agree on this unit, had testified that at the time of this conversation on February 1st in New York (pages 66, 239) he has been advised by letter from Porto Rico that Mr. Berryman, the new Government superintendent, had reduced this unit (pages 211, 241). It was thereupon shown that Mr. Berryman did not arrive in Porto Rico until January 2, 1912 (Record, page 138), and that according to Mr. Berryman's own testimony he did not notify the Carlin Company of this change until the January 31st payment of $20,000.00 was made

(Record, pages 242, 255). It is a fact of which the Court could take judicial notice that the mail service between Porto Rico and the United States is semi-weekly and that the time of voyage required is five days. Accordingly it was a physical impossibility for Mr. Carlin to know, by letter from Porto Rico, at the time of the conversation that Mr. Berryman had made any such change.

Thereafter under date of March 9, 1912, plaintiff made formal written application to the defendant for a payment of $11,735.95 (page 288). This application was made on the printed form supplied by defendant and was accurately calculated and based on the amount of work which was proved to be actually in place at that time on the building in Porto Rico (pages 70, 140, 141). This application was accordingly based on the amount of work actually done at the time it was made and on the unit price which had been agreed on as a practical construction of the contract by the parties. No payment resulting from this application, plaintiff telegraphed defendant on March 13th asking for a check (Plaintiff's Exhibit 21, page 281) and received in reply a telegram requesting Mr. Converse to go to New York (Plaintiff's Exhibit 22, page 281). Mr. Converse went to New York and had an interview with Mr. Carlin, Sr. (page 72). Mr. Carlin, Sr., stated that his son was away and gave Mr. Converse a check for $674. Mr. Converse expressed his dissatisfaction, but took the check and went back to Boston with it. No further payment being received, about May 10th Mr. Converse again went to New York and had an interview with the Carlins (Record, page 106). He again complained at not having received payments. Upon being

asked how much he had spent in Porto Rico, Mr. Converse stated approximately $35,000. The reply thereupon was made: "If that is it, you know what you can do" (page 74).

Thereafter, under date of May 22, 1912, plaintiff wrote a letter to defendant (Plaintiff's Exhibit 25, page 291) rehearsing its grounds of complaint, in which plaintiff stated:

> "We now terminate the contract and shall proceed no further with the work and we shall hold you liable for the damages we have sustained by reason of your breach of contract, including your failure to provide labor and materials not included in the contract with us in such manner as not to delay the material progress of our work and your failure to make payments in accordance with the terms of the contract and all other breaches of the contract on your part."

Under date of November 20, 1912 (about the time as it appears from other testimony that the repairs on the foundations had been completed to the point where plaintiff could have taken up its work again if it had gone on with the contract) the defendant made a contract with Guerini to complete the work which had been included in plaintiff's contract for the sum of $35,150 (Defendant's Exhibits QQ, page 330). This was the same Guerini about which defendant had said so many unpleasant things (page 194).

The plaintiff, to sustain its claim for damages, proved in great detail its actual outlays and indebtedness incurred in doing that portion of the

work under the contract which it was able to perform before it was stopped. These amounted to the total sum of $41,405.15 (pages 140 et seq., 70 et seq.). It gave credit for all payments received from defendant in the sum of $4,439.55. It also gave credit for the value of materials left on hand in the sum of $308.01. The plaintiff, while waiting to be afforded the opportunity to go to work on the building had on one or two occasions done some small outside jobs and the receipts were credited to defendant in the sum of $778.50.

After making these credits the net claim for expenditures proven was $35,814.84.

The plaintiff also proved in detail the estimated actual cost of completing the work under the contract if it had been permitted to do so by the defendant without delay (pages 75 to 78, inc.). Deducting this from the contract price gave $9,738.00 as the anticipated profits which plaintiff would have made if it had been allowed to proceed with and complete its contract in the ordinary course without delay caused by the defendant.

The jury verdict was in the sum of $35,873.09 with interest in the sum of $8,609.54, a total of $44,482.63 (page 19).

Summary.

The plaintiff was instructed to proceed to Porto Rico and be ready to go ahead with its work on January 10, 1911. It complied and from February 23, 1911, was ready, willing and able to proceed. From February 23rd to July 11th it was prevented from doing any work on the building because defendant had not yet provided the foundations on

which plaintiff's work must rest. From July to September 11, 1911, plaintiff was further delayed by defendant's failure to provide granite and set it or to call on plaintiff to set it. Between September 25th and January 12th plaintiff was delayed because defendant did not until the latter date supply all of the relatively small amount of granite which had to be set before the principal part of plaintiff's work could go ahead. On March 9, 1912, plaintiff was stopped entirely by defendant. This was nearly thirteen (13) months or 390 days since plaintiff was notified and ready to proceed; it was eight (8) months or 240 days since the foundations were actually ready to receive plaintiff's work, and about 159 days after plaintiff was notified to begin setting granite. In April, 1912, while investigation of the foundations was in progress it became evident to plaintiff that a further delay of five (5) months was inevitable. It turned out to be eight (8) months. Seventy-five (75%) per cent. of plaintiff's work then remained to be done which would have required under regular conditions about 150 days to complete after work could be resumed. In other words, plaintiff would have had to spend about two years and three months on the work. This in the face of a 300 day contract which could have been completed under normal working conditions in 200 days (page 127).

Meanwhile plaintiff had performed twenty-five (25%) per cent. of the concrete work of the total contract amount calling for about $65,000 besides about $1,400 worth of granite setting, for all of which defendant had collected in cash from the government, yet plaintiff as a result of continuous effort by letters, telegrams and personal interviews

was only able to collect $4,439.55 and was met with flat refusals to pay more. This amount is all that plaintiff has to show for expenses actually incurred, of which defendant has the benefit, amounting to over $40,000. The amount is large compared with the work done but the facts carry with them the explanation. There is no serious attempt in the record to challenge the expenditure of this amount or its reasonableness or necessity. In any event the jury have determined that.

Specification of Errors.

The Circuit Court of Appeals erred in holding that the judgment of the District Court of the United States should be reversed for the reasons set forth in its opinion. These reasons separately stated were the following:

1. That the provisions of the contract precluded the plaintiff from declining, because of delays however prolonged, to proceed with further performance of the contract and that plaintiff's only remedy in case of delays however prolonged was a suit to recover damages for the delays (pages 374, 375).

2. That the plaintiff was not justified in refusing to proceed with the work by reason of the failure of the defendant to make monthly payments, because the requisitions made by the plaintiff upon the defendant, upon which the plaintiff's right to demand such payments were based, included sums to be paid for setting granite, and that under the provisions of the contract as construed by it, the

plaintiff was not entitled to monthly payments for setting granite (page 379).

3. That testimony of an agreement between plaintiff and defendant fixing unit prices as a practical means of determining the actual cost of the work for the purpose of progress payments was inadmissible under the pleadings because modification of the contract had not been pleaded (pages 379, 380).

4. That that part of the court's charge which quoted from a portion of the opinion of this Court in *United States* vs. *Behan,* 110 U. S., 338, was erroneously given because it embodied "a duplication of elements and is misleading" (pages 380, 381).

5. That the Trial Court erred in admitting evidence tending to show that at the time the plaintiff ceased work on the building it had on hand and left upon the premises certain materials, machinery and tools of the value of $3,500 which the defendant took and appropriated to its own use (page 375).

POINT I.

The law of this case was established and determined by the decision of this court as expressed in its opinion and the proper and necessary intendments thereof, and the Circuit Court of Appeals erred in failing to give full force and effect to that decision.

Sound public policy requires that there be some definite point where litigation may be said to end, where the final word is spoken. Once a plaintiff has carried his case to the Supreme Court of the United States and has had his cause of action scrutinized and passed upon, then there should be no further questions on any point of law or construction which was before the court on the record presented on the first writ of error. On a subsequent writ of error such questions only may be considered as were peculiar to the second trial.

The fact that a different Federal Court acquires appellate jurisdiction by a change of statute and that new judges with different points of view come to pass upon the case does not alter the rule that what has been decided by this Court on one writ of error cannot be re-examined on a subsequent writ brought in the same suit.

The inquiries of the Circuit Court of Appeals should have been primarily directed to determining whether or not the Trial Court had correctly interpreted and applied the mandate of this Court as governed by the opinion. In making this inquiry the Circuit Court of Appeals should have taken the position which the Trial Court and

counsel were bound to take, namely, that the opinion of this Court must be searched for the fundamental underlying principles on which was based its determination of the points before it. We submit that instead of adopting the opinion of this Court as the proper point of departure for all inquiries on matters contained in the record on the first writ of error and steadfastly endeavoring to follow it in all its natural intendments as the Trial Court did and was bound to do, the Circuit Court of Appeals strained to avoid the effect of this Court's opinion and in reality proceeded to pass upon the case *de novo*.

In this case every word uttered by this Court in explanation of its mandate directing a new trial in accordance with its opinion, was presumably stated deliberately and with a definite purpose. A reading of the opinion makes it clear that this Court was devoting its time and careful attention to the disposition of the case as a whole on all of its fundamental points, from the construction of the contract as applied to the facts in the record down to the measure of damages, and that this was being done for the benefit of the Trial Court and the parties and in contemplation of the new trial which was to follow. This was so that the parties and the Courts might, as far as possible, be saved the waste of a second erroneous trial.

We shall point out in Points II, III, IV and V of this brief with particularity wherein the Circuit Court of Appeals failed to follow the decision of this Court when the case was here on the first writ of error, and shall, we believe, demonstrate that the Circuit Court of Appeals' decision is absolutely inconsistent with the prior decision of this Court.

The following authorities conclusively establish that when a case has once been before the court on writ of error and the case examined on the merits, this court, or any inferior intermediate court, on a second writ of error should notice only such alleged errors as were peculiar to the second trial.

Skillerns Executors vs. *Mays Executors,* 6 Cranch, 267;

Roberts vs. *Cooper,* 20 How., 467, at page 481;

Panama R. R. vs. *Napier Shipping Co.,* 166 U. S. 280, at page 284;

Illinois vs. *Illinois Central Rd. Co.,* 184 U. S., 77, at pages 91, 92;

Clark vs. *Keith,* 106 U. S., 464;

Supervisors vs. *Kennecott,* 94 U. S., page 498;

Tyler vs. *Maguire,* 17 Wall., 253 at page 284.

POINT II.

The Circuit Court of Appeals erred in construing the contract to the effect that the extraordinary delay shown in the record could not justify plaintiff in terminating its work and suing for damages for breach of contract.

On the second trial the plaintiff put in its evidence to prove the same facts of delay as appeared in the record of the first trial. On the second trial, the testimony of one witness, Mr. Berryman, that after the termination of work under the contract by the plaintiff on May 22d, 1912, conditions were such that it was impossible for plaintiff to continue with its work under the contract until the time of the first trial, November, 1912, was excluded on defendant's objection. There remained in the record, however, the testimony of Mr. Follett to the same effect (Record, page 27), and the added testimony that at the time the notice was sent, plaintiff's superintendent on the ground estimated the delay that would ensue to be about five months and that it turned out to be seven or eight months.

On the second trial the suggestion of this Court (page 271 of the Opinion) that the complaint did not allege delay on the part of the defendant in constructing the foundations prior to October 16th, 1911, was met by an appropriate amendment of the complaint (Record, pages 29-31).

The evidence of delay put in by the plaintiff, as pointed out on pages 5 to 9 of this brief, tended to show:

That the plaintiff was instructed by the defendant to proceed to Porto Rico and to be ready to go ahead with its work on January 10th, 1911;

That plaintiff complied, and from February 23d, 1911, was ready, willing and able to proceed;

That from February 23d, 1911, to July 11th, it was prevented from doing any work on the building because defendant had not yet provided the foundations on which plaintiff's work must rest;

That from July to September 11th, 1911, plaintiff was further delayed by defendant's failure to provide granite and set it or to call on plaintiff to set it;

That between September 25th and January 12th, plaintiff was delayed because defendant did not, until the latter date, supply all of the granite which had to be set before the principal part of plaintiff's work could go ahead;

That on March 9th, 1912, plaintiff was stopped entirely by defendant because the foundations, which defendant had put in, had subsided.

This was nearly thirteen months or 390 days since plaintiff was notified to proceed and it was eight months or 240 days since the foundations were actually ready to receive the granite, and about 159 days after plaintiff was notified to begin setting granite.

All work continued to be stopped and in April, 1912, while investigation of the foundations was in progress, it became evident to plaintiff that a further delay of five months was inevitable before plaintiff could begin its work anew. It turned out to be eight months before plaintiff could have again begun its work, with seventy-five per cent. of its work then remaining to be done, and this

would have required, under regular conditions, about 150 days more to complete after work could be resumed. This totals about 800 days on a contract which contemplated completion in 300 days and which, according to the testimony, could have been completed under normal working conditions, in 200 days.

A. *In holding that, under the contract, plaintiff could not be justified, on the ground of delay, in sending its notice of termination, the Circuit Court of Appeals failed to follow the construction of the contract adopted by this Court.*

In order properly to appreciate what was really held by this Court on this question the following matters in the opinion of this Court (240 U. S., pages 264-283) should be taken into view.

On page 265 the Court precedes its statement of facts with a recital that reversal is being asked "upon the ground that through erroneous rulings made by the Trial Judge the recovery was unduly limited."

Beginning its statement of facts on page 265, the Court, in its opinion, quotes fully from paragraphs 1st, 25th, 6th, 7th, 11th and 12th of the contract comprising all of the paragraphs which the Circuit Court of Appeals took into consideration in arriving at its construction of the contract (Opinion, pages 265-268, incl.).

The Court then summarizes the pleadings including that part of the complaint which alleged that because of defendant's breach of contract, plaintiff, under date of March 22d, 1912, notified defendant in writing of its election to terminate the contract and bring its action for damages for breach thereof (p. 269). The Court then proceeds

to state the facts brought out on the trial, introducing this by saying, "Plaintiff introduced evidence tending to support the material averments of its complaint."

On pages 270, 271 and 272 the Court recites fully the facts of delay down to and including the complete stoppage of the work on March 9th, 1912.

On page 274 the Court quotes fully from the written notice of termination from plaintiff to defendant of May 22d, 1912, this notice being based on delay and failure to make payment and also quotes from defendant's reply to this letter, where defendant stated that "said letter is a breach of contract on your part."

On pages 278 and 279 the Court clearly construes paragraphs 7 and 11 of the contract. The Circuit Court of Appeals based its holding on paragraph 7 which provided for an extension of time for plaintiff's benefit in case of obstruction or delay. But this Court clearly held that

> "the extension of time herein provided for was intended as a dispensation, under given circumstances, of the liability to liquidated damages imposed upon the sub-contractor by Paragraph 6 for failure to complete his work within the time therein limited. The purpose of Paragraph 7 is to relieve the sub-contractor. It cannot properly be construed to deprive him of his right under Paragraph 11 to reimbursement for losses attributable to delays assumed by the general contractor."

On page 279 this Court also held that,

"To furnish the foundation defendant assumed an obligation not conditioned by the question whether it was at fault or whether the delay was involuntary * * *."

Thus this Court held that Paragraph 11 imposed on the general contractor an absolute obligation to provide all labor and materials not included in the sub-contract in such manner as not to delay the material progress of the work.

From the absolute breach of this absolute obligation the ordinary contract rights and remedies should arise. The ordinary rule, and in a case like this, the obviously fair rule is that the injured party may elect not to proceed with his part of the contract and to hold the other party liable for his damages. The fact that plaintiff had the right to reimbursement for losses attributable to delays does not deprive him of his ordinary remedy to terminate his work for defendant's absolute breach.

Strauss vs. *Yeager,* 93 Northeastern Rep., 877, at pages 881, 882.

On page 279 the Court holds that Paragraph 7 did not cut off plaintiff from the right "to recover damages or money compensation," even though some of the delay may have been caused by alterations required by the United States Government.

Thereupon, turning to questions raised as to the measure of damages, this Court held that it was error to exclude testimony showing prospective profits (Opinion, page 280).

On pages 281 and 282 the Court held that on the testimony and the record before it, it could not be

said that plaintiff's requisitions for payment were sufficient to justify a requested instruction that because of failure to make payments, the plaintiff was justified in stopping work under the contract and recovering damages. This, it will be seen, eliminated from the record before this Court plaintiff's second ground of justification for its termination on May 22d, 1912. On the record then before this Court plaintiff could only have been held entitled to terminate on the ground of delay.

On page 282 the Court discussed one of plaintiff's requests to charge which had been refused. The request was based on *U. S.* vs. *Behan,* 110 U. S. 338, and was solely applicable to the case where plaintiff was entitled to recover damages for an absolute breach of the contract. Referring to this requested instruction, this Court said:

> "Had the requested application of these elements of damage been confined to the case of plaintiff being found entitled to recover upon the theory that the contract was rightfully terminated by the notice of May 22, 1912, we assume it ought to have been granted. *United States* vs. *Behan,* 110 U. S., 338; *Anvil Mining Co.* vs. *Humble,* 153 U. S., 540, 551, 552; *Roehm* vs. *Horst,* 178 U. S., 1, 21."

Accordingly, it appears that this Court had before it and fully considered the pleadings and proof in the case as to delay, the termination by plaintiff of its work on the ground of delay, the various clauses in the contract which bore on plaintiff's rights arising from defendant's delay; that on the record no other ground for termination but delay was open to

plaintiff, and that this Court proceeded in the light of this situation to apply measures of damage which concededly could only be applicable in the event that defendant had been guilty of an absolute breach of its contract, justifying plaintiff in refusing to proceed with its work.

Clearly, on any other theory, it would not have been eroneous for the Trial Court to exclude testimony as to anticipated profits. Equally clearly, this Court had in mind in discussing the measure of damages taken from the Behan case, that on the record before it, the jury might find that the contract was rightfully terminated by the notice of May 22d, 1912. To say that the language of the Court above quoted on this point is a mere assumption *arguendo* and can be disregarded is to close the eyes to the obvious intent and purpose of the Court in discussing the point at all. This Court was pointing out for the benefit of the Trial Judge and counsel, the proper measure of damages to be applied. If, on the record before it, this Court was not of opinion that the jury could have found on the first trial that the notice of termination of May 22d, 1912, was rightful on the sole ground of delay (the ground of non-payment having been expressly eliminated by this Court), it never would have used the language quoted.

We submit that the Circuit Court of Appeals completely misunderstood the purport of the last paragraph of the opinion on page 283. The Circuit Court of Appeals quoted this paragraph as its basis and justification for holding that this Court had not passed on the two questions of contract construction which were fundamental to plaintiff's right to terminate performance. As a matter of

fact, there were several assignments of error raised in plaintiff's brief on the first writ of error which this Court evidently felt it unnecessary to consider, in view of the fact that it had fully covered in its opinion, in connection with other assignments of error, all of the fundamental questions involved in the case. It was not the fundamental questions raised that this Court passed without consideration, but the particular assignments of error referred to. (See Exceptions Nos. 21 and 25 Record on the first writ of error, pages 153 and 154.)

B. *In so holding, and independently of the language of this Court, the Circuit Court of Appeals erred as a matter of fundamental law and contract construction.*

The Guerini Stone Company was formed by Mr. Guerini and Mr. Converse with headquarters at Boston, and the P. J. Carlin Construction Company had its headquarters in New York. The work contemplated by the contract was to be done a great distance away, in the Island of Porto Rico. The work called for by the contract, particularly the casting of concrete so as to resemble sandstone, required a high degree of skill and ability in a particular line. The work under the contract required the organization of a working force with most of the skilled labor coming from the United States, to be sent to Porto Rico and there maintained during the progress of the work (page 78).

Obviously, the inducement to plaintiff to enter into the contract was the prospect of making money, that is, performing the work at a lower

cost than the contract price. It is obvious that the cost of the work would depend directly on the length of time which it would take plaintiff to perform it. It is not a case where plaintiff could shut down operations and wait indefinitely for their renewal without serious loss and damage to itself. In the case of an indefinite delay, plaintiff would be obliged to maintain its organization continuously ready and able to take up the work again on short notice. Every surrounding circumstance shows that a fair and just construction of the contract requires that the defendant be held strictly to its obligation not to delay the material progress of the work. It apparently is not contended that this obligation on defendant's part was not absolute and definite, but the Circuit Court of Appeals contends that the only remedy for a breach of this obligation is a suit for losses or repeated suits for losses from time to time, conditioned upon the plaintiff's always maintaining itself ready and able to proceed with the work. Under the circumstances this remedy is no remedy at all. The only adequate protection for plaintiff was, once the delay became so material as to alter the situation which the parties had in mind in making the contract so as to make performance of the contract a new and different thing, to refuse to continue to be bound on its part and to terminate its work, to discharge its men, cut off further expense and hold the defendant liable for damages for breach of contract. We submit that a court of justice should require words clearly incapable of no other instruction, before it would hold a subcontractor under a contract of this nature is bound to keep itself dangling year after year, although

prevented from continuing its work through the general contractor's fault, with only the cold comfort of an occasional suit for damages for its losses.

The ordinary rule of law applicable to contract cases is that where there are mutual obligations, a default in compliance with a substantial obligation by one party gives rise to a right in favor of the other to terminate its performance under the contract and to sue for damages for breach. This is generally applied and the burden is heavy upon a party urging any other construction to sustain its contention by language clearly expressing an intention and understanding on the part of the parties that this important right has been surrendered.

C. *The defendant was foreclosed from contending in the Circuit Court of Appeals that prolonged delays would not justify the plaintiff in treating the contract as broken by reason of the charge of the Court given at its request.*

The Circuit Court of Appeals, in its opinion (Record, pages 374, 375), held that the refusal of the Court to charge that:

> "The Court instructs the jury that plaintiff was not justified in rescinding or terminating the contract because of the alleged lapse of time." (Defendant's 7th requested instruction, Record, page 261; defendant's assignment of error No. 41, Record, page 346)

constituted reversible error. This request to charge was properly refused by the Court because of its

vague form. In the form presented it might as well have referred to the lapse of time in failing to make progress payments as lapse of time in failing to provide labor and materials not included in the contract and was objectionable for that reason.

But even if the defendant's 7th requested instruction had been proper in form and had correctly expressed the idea that delays in furnishing labor and materials not included in the contract would not under any circumstances justify the plaintiff in failing to proceed with the contract, it was inconsistent with the defendant's requested charge No. 19 which was given by the Court (Record, pages 264, 276). This instruction was as follows:

> "The contract provided for delays due to failure of defendant to provide labor and materials, and provided that defendant should reimburse plaintiff for its loss. This shows that delays by the defendant were contemplated by the parties. That alone would not constitute a breach of the contract unless it amounted to a substantial ending of the contract. *Only unusual and unreasonable delays by the defendant such as would not under the circumstances and conditions surrounding the parties have been reasonably contemplated or anticipated by the parties, would constitute a breach by defendant of its contract.*"

By requesting this charge the defendant conceded that unusual and unreasonable delays by the defendant in failing to provide labor and materials not included in the contract such as would not under the circumstances and conditions surround-

ing the parties have been reasonably contemplated or anticipated by the parties would constitute a breach by the defendant of its contract.

It is well settled by the authorities that where a court is requested to charge inconsistent propositions, by a party presenting formal requests to charge, if the court charges in accordance with a party's request on any proposition that party loses his right to object to the refusal of the court to charge an inconsistent proposition.

Blashfield's Instructions to Juries, 2nd Ed., §184, page 428:

> "It is not error to refuse to give an instruction which would conflict with other instructions given at the request of the same party."

Blashfield's Instructions to Juries, 2nd Ed., §175, page 411:

> "Where a requested instruction has been given, an inconsistent instruction asked by the same party is properly refused, although the latter instruction is in itself correct."

Blashfield's Instructions to Juries, 2nd Ed., §186, page 436:

> "When a person offers several instructions on the same proposition he cannot complain that the one most favorable to him was refused."

National Enameling & Stamping Co. vs. *McCorkle.* 219 Ill., 557; *East St. Louis Ry. Co.* vs. *Zink,* 229 Ill., 180; *Percival* vs. *Chase,* 182 Mass., 371; *Ramsey* vs. *National Contracting Co.,* 49 A. D. (N. Y.), 11, are to the same effect.

The authorities above cited embody a rule of fairness and justice that cannot be gainsaid. Astute counsel for a defendant should not be permitted to request inconsistent instructions with the idea, not of assisting the Court, but of preserving an exception on which to base a reversal and thus indefinitely prolong litigation.

In any event no proper exception was taken to the Court's refusal to charge the defendant's seventh requested instruction (Record, pages 261, 277). The exceptions taken to the Court's refusal to charge were taken in gross to the Court's refusal to give such of the twenty-nine instructions requested by the defendant as were not given by the Court (Record, pages 260-266), and it is well settled by the decisions of this Court that exceptions to refusals to give instructions taken in that manner are ineffectual to reserve any question for review unless all the requested instructions should have been given. *Union Pacific Ry. Co.* vs. *Callaghan,* 161 U. S., 91, 95; *Newport News & Mississippi Valley Co.* vs. *Pace,* 158 U. S., 36; *Holloway* vs. *Dunham,* 170 U. S., 615; *Bogk* vs. *Gassert,* 149 U. S., 17.

The defendant's sixth requested instruction (Record, page 261), which the Court refused to give, in effect asked the Trial Court to hold that under the facts of the case there could be no recovery for prospective profits. This request was expressly contrary to the law of the case laid down in the decision of this Court (240 U. S., at page 280) and renders the exception to the refusal to give the instructions requested by the defendant, which were not given by the Court, unavailable.

POINT III.

The Circuit Court of Appeals erred in holding that plaintiff's requisitions for payment were insufficient to throw the burden of payment on the defendant by reason of the inclusion of granite work.

A. *The holding of the Circuit Court of Appeals was contra to the intendment of the decision of this Court.*

On pages 281 and 282 of its opinion this Court discussed the question of plaintiff's termination on the ground of non-payment. The requisitions were the same in both records. The testimony as to non-payment was to the same effect and the only difference in the record of the second trial is because of the fact that plaintiff took advantage of the criticism of this Court contained in the words on page 282. "But the evidence fails to show that the requisitions were based upon the cost of the work or that any clear statement of such cost was submitted with them."

On the second trial, after proving that the parties had agreed on a unit price covering the concrete work on which a requisition for payment was to be based and accepted (pages 96, 97; Plff's Ex. 14, page 285), plaintiff proved that at the time that the requisition of March 9th was rendered in the sum of $18,237 it was correct and based on the actual amount of work then done, multiplied by the agreed unit.

On page 193 of the record plaintiff put in testimony to prove that the number of cubic yards of

concrete actually in place, multiplied by the agreed unit, and the number of square feet of granite actually sent, multiplied by the contract price, correspond with the figures enclosed with the application of March 9th. It is to be noted that the contract called for applications on a printed form to be furnished by the defendant (Paragraph 12th of the contract, page 10). The printed form as furnished in blank by the defendant is shown by Plaintiff's Exhibit 12 (page 284). The only statement called for on defendant's printed form applying to work done is as follows:

"Amount of work completed to date, $.....

Cash received, $.....

Charges, $.....

Amount of—per cent. reserve, $.....

Total, $.....

Amount of this application, $....."

In the application of March 9th (Plaintiff's Exhibits 18 and 19. Record, pages 287-288), all the information called for by defendant's blank was filled in and submitted and the correctness of the figures was proved by testimony as to the actual amount of work done and the application of the correct multiples for price (Record, page 141).

The Circuit Court of Appeals evidently was satisfied that the plaintiff had complied with the requirements of the Supreme Court in this regard.

In view of the fact that the inclusion of granite setting in the requisitions was before this Court on the first writ of error, and in view of this Court's

careful consideration of the requisitions and their effect, we submit that any new construction of the contract, holding the requisitions ineffective because of the inclusion of granite, is foreclosed by the opinion of this Court.

Even if such a construction had been suggested to the Trial Court, we submit that he would not have felt justified in adopting it in view of the mandate and the careful consideration which the requisitions and unit prices had received at the hands of this Court.

B. *In so holding, the Circuit Court of Appeals erred as a matter of fundamental law and contract construction.*

The contract pages 5-12 was a regular form containing blanks to be filled in, covering the work to be done, price, duration and other details. The first paragraph provides for work which it was definitely agreed should be done by plaintiff. This paragraph is followed by twenty-three others, setting forth the terms and conditions under which the work was to be performed. These terms and conditions included, among many others, provisions that the sub-contractor would comply with the drawings and specifications and provide at its own expense, scaffolding, implements, etc., that no alterations were to be made in the work or materials, except upon written order, and changed values should be computed and subject to arbitration; provision for safe and proper facilities for inspection by the owner, obedience to architects' instructions, time of completion, obtaining of permits and a large number of other provisions, all of

which were obviously applicable to the granite work as well as to the concrete work. We submit that if it had been suggested at any time to the general contractor that the granite work was not covered by the general provisions of the contract, the proposition would have been received with incredulity. The whole form of the contract shows that the parties contemplated an absolute obligation to do the concrete work and an option on the part of the contractor to call upon plaintiff to do the granite work, all to be governed by the general provisions of the contract, and that the general provisions as to monthly payments on account after receipt of requisitions were understood by both parties to apply to payments for the granite work as well as for the concrete work.

Particularly is the intention of the parties shown by the following provision contained in Paragraph 25th of the contract (Record, page 11):

> "And the said general contractors hereby promise and agree with the said subcontractor to employ, and do hereby employ him, to provide the materials and to do the said work according to the terms and conditions herein contained and referred to for the price aforesaid, and *hereby contract to pay the same at the time, and in the manner and upon the conditions above set forth.*"

This provision immediately follows that part of the agreement giving the defendant the option, among others, to require the plaintiff also to

> "set in position all the granite walls, steps, balusters, buttresses and curbing, and all other

granite work, for the sum of forty cents a square foot surface."

The provision above quoted obviously is intended to apply to all the work embraced in the contract whether or not the defendant became obligated at the time of signing the contract or at the time of exercising the option for additional work. All the work was to be done on the same building; the granite setting and the concrete construction were to proceed concurrently (pages 25, 28). There was absolutely no reason why granite setting should not be paid for monthly as well as the concrete erected in the building. A construction holding otherwise does violence to the intention of the parties as appears from the words of the contract and all the surrounding circumstances. When the parties stipulated that the work was to be paid for at the time, and in the manner and upon the conditions above set forth, it was undoubtedly intended that those words should have a full and complete operation. If the construction adopted by the Circuit Court of Appeals is correct, this provision would have a partial and limited operation only. A construction that the granite was to be paid for only when it was completed, because the law only requires payment upon completion, is repugnant to an express stipulation that the work will be paid for at the time, and in the manner and upon the conditions above set forth.

Furthermore the construction adopted by the Circuit Court of Appeals has never been suggested by any judge or any lawyer in the history of this litigation until the Circuit Court of Appeals handed down this decision. This is as conclusive

as anything could be as to the interpretation which the defendant put on its own contract. No such point was made by defendant at either trial and no objection on this ground was made by defendant on the second trial when the requisitions were offered; in all discussions between the parties as to requisitions and payment no suggestion was made that the defendant objected to the requisitions on this ground. If there is any doubt as to whether the provisions for monthly payments applied to the granite setting as well as to the concrete work the practical construction placed upon it by the parties resolved that doubt.

Moreover it appears at page 108 of the Record that at a conversation between the President of the plaintiff and Mr. Carlin, the representative of the defendant, about the first or second of February, 1912, more than a month before the requisition of March 9th was made, Mr. Carlin told Mr. Converse to put the amounts, both of concrete and granite, on the requisitions for monthly payments. Mr. Carlin stated (page 108):

> "He told me to render them the information as to the number of yards of concrete put in and the number of square feet of granite in a separate letter, because his form did not call for these units, figures or quantities; *on the blank itself I was to put the amounts.*"

Mr. Converse's testimony on this point was nowhere contradicted. Accordingly the requisition of March 9th and the accompanying letter showing detail of work done (Plaintiff's Exhibits 18 and 19, pages 287, 288) were made up in exact conformity with the instructions of the defendant's

representative and these instructions being acted upon by the plaintiff, the defendant is estopped to deny that the requisitions were proper in form.

Finally the Circuit Court of Appeals seems to have ignored the fact that plaintiff's granite work under the contract was completed before the requisition of March 9th was made and presented to the defendant. It appears on page 24 of the record that the parties mutually agreed that plaintiff should do no more granite work in February, 1912. This fact was noted by this Court on page 271 of the opinion on the former appeal where this Court said: "On or about February 12, 1912, plaintiff stopped setting granite with defendant's consent." Accordingly on March 9th, when plaintiff's last and most formal requisition was made, the granite work was in fact completed, as far as plaintiff was concerned, and even if the construction adopted by the Circuit Court of Appeals can be sustained it had no application to the final requisition and the record containing the facts justifying termination by the plaintiff by the defendant's failure to make payments. Because of the fact that this construction of the contract was first suggested in the opinion of the Circuit Court of Appeals counsel had no opportunity to point out to that court these facts appearing in the record.

C. *Both parties in the Trial Court having proceeded upon the theory that payments for granite setting should be made monthly, the defendant was precluded from raising the point for the first time on appeal.*

The Circuit Court of Appeals in writing for reversal called attention to various instructions of the court and failure to give instructions (Record,

pages 375, 376) as raising the question as to whether or not the requisitions admitted in evidence formed a basis for a valid demand by the defendant for payments. The instruction and refusal to instruct on this point adverted to by the Circuit Court of Appeals (Record, pages 375, 376), the instructions requested by the defendant (Record, pages 260, 266), and the defendant's exceptions to the Court's charge (Record, pages 277, 278), show that the question as to whether or not the requisitions were regular by reason of the inclusion of items for setting granite was not raised in the Trial Court. No exception was taken to the admission in evidence of these requisitions (Record, page 66, Plaintiff's Exhibit 13; Record, page 67, Plaintiff's Exhibit 18; Record, page 71, Plaintiff's Exhibit 19).

It is well settled by the decisions of this Court that questions of law not presented to or considered by the court below and not raised by requests for instructions or specific exceptions to the court's charges given or by exceptions to the admission or exclusion of evidence, cannot be considered for the first time upon appeal (*McDermott* vs. *Severe*, 202 U. S., 600, 611; *Dotson* vs. *Milliken*, 209 U. S., 237, 242). And the Circuit Court of Appeals in reversing on a ground not presented to the court below violated this well established rule.

POINT IV.

The Circuit Court of Appeals erred in holding that the practical construction placed upon the contract by the parties by their agreement as to unit prices for the concrete work was inadmissible under the pleadings.

The circumstances which led to the adoption of unit prices for the concrete work are very clearly stated by this Court in the opinion on the former appeal, 240 U. S., at pages 273 and 274, as follows:

> "Meanwhile, the parties had been in disagreement about payments on account. The contract (paragraph 12) provided for payment of the contract price 'in monthly payments on account, not to exceed in amount 85 per cent. of the cost of the work actually erected in the building, provided that the Sub-Contractor furnishes to the General Contractor a written requisition, on a form to be supplied by the General Contractor, not less than twelve days before payment is required,' etc. The contract, however, did not provide how the cost of the work other than the granite setting should be ascertained. For the concrete backing and other concrete work and the imitation sandstone covered by the sub-contract, no 'unit prices' were specified. The price of '6.70 a cubic foot,' mentioned in the twenty-fifth paragraph as the optional price for concrete footings, was treated by the parties as if intended to read $6.70 per cubic yard—approximately

25 cents per cubic foot. This, however, had reference to work that plaintiff was not called upon to do, and obviously did not furnish a unit price for the concreting actually done by plaintiff.

"In December, 1911, and January, 1912, plaintiff made written requisitions for payments on account, based upon statements of the 'amount of work completed to date.' They were not complied with, and the parties soon realized the practical importance of agreeing upon a unit price to be employed in estimating the amounts payable. According to the testimony of Mr. Converse, President and Treasurer of the Guerini Company, he went from Boston to New York City on February 2, 1912, by appointment, and conferred with Mr. Carlin, defendant's representative, upon the subject of unit prices, and it was then agreed that plaintiff should make its applications and receive its payments upon the basis of a certain written schedule of units, produced by Mr. Carlin, which specified (*inter alia*): 'Exterior and interior concrete walls, arches and cement work, $1.07 per cu. ft.; Concrete floors and casings, 45½¢ per sq. ft.'"

The testimony on the second trial as to the events leading up to the adoption of unit prices was the same as on the first trial and the summary in the words of this Court of the evidence on the first trial is an absolutely correct summary of the evidence adduced on the second trial.

It will be seen from the language above quoted that it was evidently the feeling of this Court that

adoption of unit prices was a practical construction of the contract by the parties. It was so treated by the Trial Court as shown by its language in instructing the jury on page 270 of the Record, as follows:

> "It was the right of these two gentlemen of these two companies to agree upon a *modus operandi*. A written contract in the nature of the case cannot specify all the details that would come up from day to day, ways of doing different things, so that if these two gentlemen, on February 2nd, or any other time, agreed upon a unit upon which payments were to be made, that is an important point."

No exception was taken to this part of the Court's charge (pages 277-278).

This construction was consistent with the Court's ruling at page 67 of the Record, admitting the evidence as to the adoption of unit prices, not as a modification of the contract, but as a practical construction of the words of the contract providing that the monthly payments should be made on the basis of the "cost of the work actually erected in the building," in view of the great difficulty in determining what the cost of the work actually erected in the building at any one time might be and what elements of overhead charges, etc. might properly be included in such cost. There was an ambiguity in the contract which the parties attempted to resolve and which the verdict of the jury established the parties did resolve.

The proposition that the practical construction given by parties to a contract, particularly where

the contract is ambiguous, is admissible, not as evidence of modification of the contract but as evidence bearing on what the contract really means, has many times been decided by this Court.

Cavazos vs. *Trevino,* 6 Wall., 773, at page 785;
Chicago vs. *Sheldon,* 9 Wall., 50, at page 54;
Insurance Co. vs. *Dutcher,* 95 U. S., pages 269, 273;
Topliff vs. *Topliff,* 122 U. S., 121, 130, 131;
District of Columbia vs. *Gallagher,* 124 U. S., 505;
Constable vs. *National Steamship Co.,* 154 U. S., 51, 95;
Lowry vs. *Hawaii,* 206 U. S., 206, 222;
Kidwell vs. *The Baltimore & Ohio R. R. Co.,* 11 Gratt, 676;
Vermont & Canada R. Co. vs. *Vermont Cent. R. Co.,* 34 Vermont, 1.

The objection made by the defendant and upheld by the Court of Appeals that the evidence as to the adoption of unit prices was inadmissible under the pleadings is very technical indeed. The same evidence was introduced upon the prior trial and was considered by this Court on the former appeal. The defendant was not in any way misled or surprised by the introduction of this testimony and we believe it is quite clear that its reception, over the objection and exception of the defendant, was not reversible error.

POINT V.

In holding that the Trial Court erred in its instructions as to the measure of damages the Circuit Court of Appeals failed to follow the decision of this Court and was in error.

When this case was before this Court on the prior writ of errror the plaintiff claimed that an improper measure of damages had been applied by the Trial Court in its instructions to the jury and accordingly this Court was called upon to consider just what measure of damages was applicable. The plaintiff had requested the Trial Court to charge a rule of damages laid down by this Court in *U. S.* vs. *Behan,* 110 U. S., 338. This the Trial Court refused to do, and, an exception being taken, this Court considered in its opinion whether or not the charge should have been given. It was held that the Trial Court was justified in refusing to give the charge because the measure of damages sought to be applied was a measure which was only applicable in case the plaintiff had the right to treat the contract as broken by the defendant and to sue as for an entire breach, and was not applicable in case the plaintiff was suing on a *quantum meruit* or for a partial breach.

In its discussion of the matter this Court said at page 282 of its opinion:

> "Error is assigned because of the refusal to instruct the jury as follows:
>
> 'In estimating the recovery to which the plaintiff is entitled, if you find he is entitled

to recover, you should consider the reasonable expenditures incurred, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work as the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract.'

"Had the requested application of these elements of damage been confined to the case of plaintiff being found entitled to recover upon the theory that the contract was rightfully terminated by the notice of May 22, 1912, we assume it ought to have been granted. *United States* vs. *Behan,* 110 U. S., 338; *Anvil Mining Co.* vs. *Humble,* 153 U. S., 540, 551, 552; *Roehm* vs. *Horst,* 178 U. S., 1, 21."

We submit that this language of this Court was not to be lightly disregarded, as a mere assumption, by the Trial Court or by the Circuit Court of Appeals. Here again, the Supreme Court was pointing out, for the benefit of the Court and parties upon a second trial, the defects which it found in the requested charge and indicating how the defects should be remedied so as to leave a charge which could properly be given. Under the circumstances it was the plain duty of the Trial Court to give the charge, once such defects were remedied.

At the second trial the charge quoted by the Supreme Court was requested by plaintiff with a proper limitation confining its application to the case of plaintiff being found entitled to recover upon the theory that the contract was rightfully

terminated. It was thereupon given by the Trial Court, with an addition that added no new elements for the jury's consideration in approaching the question of damages.

The charge as given by the Trial Court was as follows (page 274):

> "Returning now to the question of damages, supposing the first point to be settled in your minds, which I do not direct you at all is settled, in estimating the recovery to which the plaintiff is entitled, if you find he was justified in terminating the contract as he did on May 22 upon the principles above given you, you can consider the reasonable expenditures incurred by the plaintiff, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract."
>
> (Record, page 274.)

With regard to this charge, the Circuit Court of Appeals held that, "The trouble with the instruction is that it embodies a duplication of elements and is misleading."

We respectfully submit that any such question as to this charge was foreclosed by the opinion of this Court and that on a second writ of error the question of duplication of elements or tendency to mislead was not open for re-examination.

The Circuit Court of Appeals apparently ignored the language of this Court on this subject, as no reference is made to it in its opinion.

Furthermore, we submit that the assumption of this Court that this instruction, if properly confined, should have been given, was correct in view of the cases cited.

If there were any duplication of elements in the charge criticized, the duplication was cured by the Trial Court in other parts of his charge, particularly on page 267, where the Court said:

> "The man who is injured, if that be the case, is entitled to be put back where he was * * *. The object is to put a man back where he was, to reimburse him * * *. He is entitled to recover what he has lawfully expended in trying to carry out his contract. That would cover a number of things. It would cover his own labor. It would cover the labor that he has put on the job. It would cover the material he has supplied and perhaps one or two other things, but that would be the substantial feature of it on that line. The other line of recovery is that where he can show that he would have made a profit, he is entitled to the profit that he has been prevented from obtaining. *He can recover what he has actually lost in money or labor or material and he can recover what he would have made if the other party had permitted him to carry on the contract.*" (Italics ours.)

The Court also instructed the jury (Record, page 371) that the loss would consist of *"two distinct items of damage, first, his outlay and expenses, less*

the value of materials on hand; second, the profits he might have realized by performance."

Finally, as shown by the evidence of damages introduced, no item of damages was permitted to go to the jury that would not be covered by the language of the Circuit Court of Appeals on page 13 of its opinion, with the exception of the value of the tools, which is discussed under our next point.

No exception was taken to that part of the charge of the Court quoting from the Behan case in such manner as to save for review the question as to whether or not that part of the Court's charge "embraces a duplication of elements and is misleading."

The part of the charge quoted by the Court from the Behan case was given at its own instance and not upon the request of either party. The only exceptions taken to this part of the charge were the following:

> "Defendant also excepts to the charge of the Court in so far as it allows the jury to consider damages in excess of *quantum meruit*" (Record page 277).
>
> * * * * * * *
>
> "To that part of the charge in which the Court read from the case of *U. S.* vs. *Behan* in that the decision also covered the case of unwarranted breaking of a contract and the limitation of damages to a *quantum meruit* in such case" (Record page 278).
>
> * * * * * * *
>
> "To that part of the charge to the effect that if the plaintiff had the right to terminate the

contract under the authority of the Behan case that the measure of damages would be not only the expenses incurred by the plaintiff but also reasonable profits" (Record page 278).

These exceptions were specific; they were clearly directed not to a criticism of the form of the charge as duplicating elements or as being misleading, but to bringing to the Court's attention the defendant's contention on two concrete questions of law:

(1) That the Behan case covered an unwarranted breaking of a contract (which defendant contended this case did not), and that the Behan case properly construed limited the damages to a *quantum meruit;*

(2) That the Court was in error in charging that the plaintiff, if it had the right to treat the contract as broken because of the defendant's failure to provide foundations and to make progress payments in accordance with the contract, could not in any event recover prospective profits.

It was nowhere pointed out to the Trial Court by counsel for the defendant that the instruction as given embodied any duplication of elements or was misleading in character and the court was not given the opportunity to correct the charge in this respect, if correction were needed, but we think that the Court's charge considered as a whole leaves no ground for the criticism that the jury might have been misled as to the measure of damages or that they could consider duplicate elements.

It is well settled by the decisions of this Court that exceptions to the charge of a court in order to be available on writ of error must point out specifically the defect in the charge: (*McDermott* vs. *Severe*, 202 U. S., 600, 611; *Dotson* vs. *Milliken*, 209 U. S., 237, 242; *Chicago Great Western R. Co.* vs. *McCormick*, 200 Fed., 375; *Beiseker* vs. *Moore*, 174 Fed., 368; *Louisville & N. R. Co.* vs. *McClish*, 115 Fed., 268).

The exceptions to the charge of the Court quoted from the Behan case, which the Circuit Court of Appeals assigned as one of the grounds of reversal, did not specifically point out any misleading characteristics and should not have been considered by the Circuit Court of Appeals and the judgment should not have been reversed on that ground.

POINT VI.

The Circuit Court of Appeals was not warranted in reversing the judgment because of the admission of evidence tending to show that at the time the plaintiff ceased work on the building it had on hand and left upon the premises certain materials, machinery and tools of the value of $3,500, which the defendant appropriated and used in completing the building.

Evidence was received on the trial, over the defendant's objection and exception, that at the time the Guerini Stone Company stopped work it had on hand certain materials, machinery and tools of the value of $3,500 (Record, pages 146-148). It appeared that these materials, machinery and tools left the possession of the Guerini Stone Company by order of Court and remained on the building site (Record, page 147). An amended bill of particulars filed by the plaintiff contained an item "Value of tools and machinery converted by defendant, $3,500" (Record, page 17). The Circuit Court of Appeals held (Record, page 375) that the conclusion to be drawn from the evidence and the bill of particulars was that the defendant converted the materials, tools and machinery to its own use and that the plaintiff's claim, if any, by reason of the appropriation of these materials, machinery and tools by the defendant should have been enforced by an action in conversion and that evidence that these materials, machinery and tools remained and

were used upon the work was improperly admitted under the pleadings.

The evidence was admitted, however, on the theory that the moneys expended for the materials, machinery and tools was money expended in the prosecution of the work for which the defendant was chargeable under the rule laid down in the Behan case (pages 146, 147). If the plaintiff had been permitted to take these materials, machinery and tools away when it ceased the work on the contract, the defendant would have been entitled to a credit for the material, machinery and tools on hand. But inasmuch as the defendant used these materials, machinery and tools upon the building site after the plaintiff had stopped work on the building, they were not entitled to a credit for property which they had retained. On this theory we believe that the evidence was properly admitted in accordance with the allegations of paragraph XIII of the complaint (Record, page 5):

> "That plaintiff has been damaged in the sum of $35,525, which amount has been actually expended by it to date in and about the furnishing of work, labor and material provided for by the said contract, and has been damaged in the additional sum of $5,000 by reason of loss of time, waste of material and damage to equipment caused by the delay above set forth, and that plaintiff has also been damaged in the sum of $9,712, the same being the amount of profits which plaintiff would have made if defendant had complied with the terms of its contract, and that no part thereof has been paid by defendant to date, except the sum of $4,439.55."

The bill of particulars served was no part of the pleading and did not change the action from one of breach of contract to one of conversion. If the materials, machinery and tools were converted by the defendant and used by it in the completion of the work and the plaintiff acquiesced in such use but failed to give credit for the value of the materials, machinery and tools, the defendant cannot complain because the plaintiff might, if it so desired, also have sued in conversion.

But even if there was error in admitting this testimony and by reason thereof the jury was permitted to add an element of $3,500 and interest to the verdict which the plaintiff was not entitled to recover under the form of action employed, the judgment should not have been reversed for that reason.

In *Hansen* vs. *Boyd,* 161 U. S., 397, an action for breach of contract, it appeared that the Trial Court erred in instructing the jury that under certain circumstances they might find ratification of a purchase of 40,000 bushels of wheat for June delivery. This court held that there was no evidence in the record which justified the submission of the question of ratification of this particular transaction to the jury, and also held that other errors complained of were without foundation and that the plaintiff was in other respects entitled to recover the sum sued for with interest (pages 401, 402). This court held that the judgment should stand provided the defendant in error remitted the excess representing the loss on the purchase and sale of the June wheat, amounting to $1,300, the commission charged in the transaction $50, and interest on those items (page 411). The Court said:

"The question arises as to the proper judgment to be entered. The plaintiffs below recovered judgment for the full amount of their claim. The June wheat purchase and sale were distinct and separable from the other transactions upon which a recovery was had. The amount of loss arising from the purchase and sale of this wheat, including the commission charged by Boyd & Bro., is clearly ascertainable from the evidence contained in the record, while the interest thereon embraced in the judgment is matter of simple calculation. The rule has been adopted by this court that it is proper, either for the trial court upon an application for a new trial, or for an Appellate Court in reviewing a judgment, to permit the party in whose favor a verdict or judgment has been returned or entered, to avoid the granting of a new trial on account of error affecting only a part thereof, by entering a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same. *Koenigsberger* vs. *Richmond Silver Mining Co.*, 158 U. S., 41, and cases cited, page 53; *Phillips & Colby Construction Co.* vs. *Seymour*, 91 U. S., 646, 656."

To the same effect are

Phillips & Colby Construction Co. vs. *Seymour*, 91 U. S., 646, at page 656;

Washington & G. R. Co. vs. *Harmon*, 147 U. S., 571, 590;

Loewer vs. *Harris*, 57 Fed., 368;

Hazard Powder Co. vs. *Volger*, 58 Fed., 152.

The circumstances in this case are the same as those in *Hansen* vs. *Boyd*. If the evidence as to the materials, machinery and tools remaining in the hands of the defendant was erroneously admitted by the Trial Court, the judgment is $3,500, plus interest at 6% on that amount, from May 22, 1912, to the day of trial, greater than it ought to be, and the error of the Trial Court, if any, will be corrected by remitting the sum of $3,500 and interest.

LASTLY.

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court for Porto Rico should be reinstated in the interests of substantial justice.

The plaintiff, in performance of the contract entered into with the defendant, on a contract calling for a payment of $64,750, for the concrete work and an additional amount for setting concrete, had performed 25% of the concrete work (Record, pages 108, 113, 142), and had practically finished setting the granite. The work had been delayed by the defendant so that in performing a contract which, by its terms, was to have been completed in 300 days (Record, page 8) on May 22, 1912, 450 days had already elapsed and the concrete work was only about 25% completed, and plaintiff was then confronted with an interruption in the work, due to no fault of its own, which continued for six months thereafter or until November, 1912 (Record, page 27) before the work could be continued and the remaining 75% of the concrete work completed. In the meantime defendant had been paid in cash for concrete work by the United States Government the sum of $20,000 (Record, page 242), but the plaintiff had only received $4,439.55 after completing 25% of the concrete work under a contract calling for $64,750, for all the concrete work and was met by the defendant's flat refusal to pay more.

In carrying on the work under the contract the plaintiff expended upwards of $35,000. After five years of litigation and after the case had been con-

sidered in this Court and a full opinion written, the case was tried anew by a Trial Judge who felt constrained to treat this Court's decision as the law of the case and to follow its every intendment. This trial resulted in a verdict for the plaintiff for an amount representing only the plaintiff's actual outlay and interest (Record, pages 17, 279, 280), and we feel that this Court, on an examination of the Record, will perceive that the verdict of the jury on the second trial was eminently just and fair and that its prior decision was carefully followed by the Trial Judge and that the verdict and the judgment entered thereon should be permitted to stand.

It is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the First Circuit should be reversed and the judgment of the Trial Court reinstated.

Respectfully submitted,

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Supreme Court of the United States

GUERINI STONE COMPANY,
Petitioner,

against

P. J. CARLIN CONSTRUCTION CO.,
Respondent.

BRIEF FOR DEFENDANT

Statement.

(REFERENCES ARE TO MARGINAL PAGES.)

This case comes before the United States Supreme Court on a writ of certiorari to the United States Circuit Court of Appeals, First Circuit (pp. 540-544).

The case as presented by the petitioner is so incomplete and so colorful of petitioner's views and so much is omitted that modifies its statements, that respondent deems it necessary to give a statement of the facts.

PLEADINGS AND CONTRACTS.—This is an action at law by plaintiff sub-contractor against the defend-

ant general contractor (Complaint, pp. 7-11*) comprising several different causes of action on, under and for a breach or rescission of a contract made December 16, 1910 (pp. 12-21), for furnishing and setting in position certain concrete and imitation sandstone for the San Juan Post Office Building, at San Juan, Porto Rico, agreeably to the drawings and specifications and under the direction and to the satisfaction of the United States Supervising Architect, his or its representatives, and under the direction and to the satisfaction of the general contractor, the defendant (p. 12)* The plaintiff sub-contractor was to furnish all labor and materials and all machinery, plant and appliances necessary to the performance of his work, and the decision of the architect was to be final and conclusive.

Among other provisions in said contract were those which plainly contemplated delay by the Government, its architect, the general contractor (p. 15) and by defects in the work (p. 17), and which contract further provided,

> "11th. The general contractors will provide all labor and materials not included in this contract, in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the sub-contractor agree that they will reimburse the sub-contractor for such loss,"

And the sub-contractor agrees substantially to reimburse the general contractors for any delay

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* References are to pages of the original transcript record, or *marginal pages.*

that it might cause. The amount of such loss and damage in either case was to be fixed and determined by the architect or by arbitration, as provided in Article 3 of the contract (p. 13).

The said contract also referred to the drawings and specifications made by the architect (copies of which had been delivered to the sub-contractor) (pp. 277, 280, 438), and provided that the work should be performed and finished "according to the true intent and meaning of said drawings and specifications."

CLAIM.—The gist of the case as presented to this Court is that the plaintiff complains that the defendant did not

> "provide all labor and materials..... in such manner as not to delay the material progress of the work....."

thereby causing loss to the sub-contractor, the plaintiff, and that therefore the defendant must reimburse the sub-contractor for its damages and losses, and the complaint alleges default on the part of the defendant, delays and obstruction to plaintiff's work by reason of which the plaintiff terminated the contract and sued for its damages. The action is based on Clause 11 of the contract (pp. 17-18).

The action was tried at San Juan, Porto Rico, May 31, June 8, inclusive, and resulted in a verdict for $35,873.09,
and interest, ... 8,609.54,

or a total verdict of (p. 381)..... $44,482.63.

Subsequently a motion was made to set aside the verdict on the ground that the damages awarded by the jury in its verdict were excessive, appearing to have been given under the influence of passion or of prejudice, and that the verdict was against the evidence and the weight of evidence, against the law and instructions given to the jury, and for errors in law occurring at the trial (pp. 467-468), which motion was denied (p. 468). The case was brought up by writ of error (pp. 514-521) on assignments of error (pp. 470-513).

This is the second trial of this action, the former trial having been had in the same court and an appeal taken by both parties to the U. S. Supreme Court at Washington, which resulted in a reversal of the judgment entered and an order for a new trial. The opinion of that Court is printed at 240 U. S. Rep. 264. The attorney of record for the defendant upon the former trial was Mr. Francis H. Dexter, for whom Mr. Charles Hartzell has been substituted, both attorneys having offices in San Juan, Porto Rico; but the case was tried for the defendant the second time by Mr. John C. Wait, of New York City, who appears as counsel in this appeal (p. 50).

FORMER TRIAL AND APPEAL.—The appeal is from the judgment of a second trial, the former trial having been upon quite different pleadings, amendments having been made to the complaint (pp. 45-46, 50, 58) to remedy weaknesses pointed out in the opinion of the U. S. Supreme Court, and to the answer (pp. 31, 58), and the evidence at the second trial having been limited and restricted as it was not at the first trial. Many things admitted at the first trial were properly excluded at the present

trial and the record is materially different. As the Court said at the trial:

> "The Supreme Court is discussing the evidence that was in the case, however it got there I do not know, and it was perfectly right in going (deciding) upon, what was before it. I think my ruling is right" (p. 191).

The Supreme Court itself remarked in its opinion that notwithstanding *the plaintiff was limited by his pleadings that the evidence was not limited.*

WHAT WAS AND WAS NOT DECIDED.—The opinion of the Supreme Court (240 U. S., 264) decides the following:

(1) That defendant based its defense at the first trial upon the provision of its contract with the Government, which *must be read into the Contract* between the plaintiff and defendant, which was error; that the reference in the party's contract to the Government drawings and specifications was for *special or limited purpose* and that a construction that the clauses of the Government's specifications intended that delays attributable to the action of the owner (U. S.) should leave plaintiff remediless would be inconsistent with the 11th paragraph of the parties contract, which placed upon defendant the obligation

> "to provide all labor and materials not included in the contract in such manner as not to delay the material progress of the work."

(2) That the provision for an extension of plaintiff's time in case of delay did not preclude any claim by plaintiff for damages for such delay.

(3) That paragraph 11 of the contract bound

> "defendant to *reimburse* plaintiff for any loss caused by delay resulting from defendant's failure to provide materials not included in the sub-contract"

and defendant contends that it likewise bound plaintiff equally to *accept* "any loss caused by delay resulting from defendant's failure to provide materials" as *the measure of his damages for delay.*

(4) That the *granite* and the *foundations* were "labor and materials not included in this contract" as referred to in paragraph 11.

(5) That the profits were not contingent and speculative. That evidence of the estimated cost of furnishing the materials and doing the work by an experienced witness was admissible and competent.

(6) "That the contract does not either specify the amount of the advance payments or indicate how they are to be ascertained."

That the contract required substantial payments monthly, if due per contract, fairly approximating but not exceeding 85% *of the cost of the work actually erected in the building,* provided, etc. (pp. 18, 12, 21); but the sub-contractor is not the judge of the amount it was to receive, but the contract contemplates that the defendant was to verify the propriety of the plaintiff's demand.

NOTE.—The evidence shows that the applications and requisitions were not based upon the cost of the

work (pp. 158-159, 166-167) but upon what the defendant was supposed to be receiving from the Government (pp. 153, 392-393) and upon what the plaintiff thought he was entitled to receive (pp. 167, 152-157, 166-167).

(7) That is all that the opinion of the Supreme Court holds or determines, the remainder being statements of fact under a former trial and mere *dicta* of what might be under other circumstances and conditions.

The Supreme Court did determine one very essential point of law in the case, *viz.:* that the *measure of plaintiff's recovery for delay* by defendant or the Government is plaintiff's "losses attributable to delays assumed by the" defendant; or

> "any loss caused by delay resulting from defendant's failure to provide materials not included in the sub-contract"

and that is decisive in this case, and warrants a reversal of the judgment.

The Supreme Court did not determine under what circumstances the failure to make monthly payments would constitute a breach of the contract and justify plaintiff in terminating the contract; but the last part of the Supreme Court's opinion shows that the Court, and the plaintiff too, as indicated by the instructions it requested as stated in the opinion, fully understood that as a basis of recovery of damages including profits plaintiff must establish that defendant's acts, in not making progress payments and in any other breaches of contract, amounted *to a refusal to perform on its part* or to physically *preventing the plaintiff from performing* its contract.

No such proof has been tendered or adduced in the case, but to the contrary.

Introduction.

Every building and construction contract is drawn to avoid what has happened in this case. Every clause of the contract between these parties is intended to forbid and preclude a termination, rescission or abrogation of the contract, and a recovery of unreasonable and extraordinary profits under the color of damages. A contract that does not take such precautions would be a misfortune to either party, to the owner if the contractor found he had an unprofitable job as in this case, and to the contractor if the owner wished to abandon the work. The contract is a form that has been long in use among builders and it has the approval and endorsement of the National Builders' Association and the American Institute of Architects. Every paragraph of the contract is intended to secure the co-operation of the parties to a common end, the ultimate erection and completion of a public building and to provide for every contingency that could arise and particularly to provide for delays and to prevent a termination or rescission of the contract and the recovery of damages not commensurate with those actually suffered.

In this case, we have a sub-contractor recovering from the principal contractor the sum of $35,873.09 verdict (p. 32) and $8,609.54 interest (p. 33) under a termination of a contract to do work on a Federal Post Office and Court House at San Juan, Porto Rico, at a total contract price of $64,750 (p. 18), and when the plaintiff confessedly did not do 25% of his contract work (pp. 157, 161, 193-

195) in quantity; and when he did less than $7,014 of the contract work in value (p. 195, 573 cu. yds. at $10) or 13.1%, about one-seventh of the job. This is certainly putting a premium upon bad acting and provoking a breach, that has rarely come to the attention of the Court.

PERSONNEL OF WITNESSES—This action introduces to the Court, first, the defendant, a construction corporation of New York, comprising several members of the Carlin family, who have been general builders for thirty years in New York City and throughout the eastern and middle states. Its present executive officer is Mr. J. P. Carlin, a graduate civil engineer of about forty years of age (p. 276). The defendant had the entire contract for a Government Post Office and Court House at San Juan, Porto Rico, at about $352,000; and as there is no good building stone on the island it was provided that the building should be of artificial stone, from materials to be had locally; *viz.*, an exterior of artificial sandstone.

This requirement brought to the defendant the plaintiff's assignor, one Italian named Annibale Guerini (p. 133), an artist, who had made a specialty of casting artificial stone in plaster casts made from clay models (pp. 38, 62, 66, 77-78, 92, 128, 133, 169, 274). It was admitted by plaintiff's president that this artist was excitable, irritable (pp. 133-137, 441, 451, 455) and caused trouble between the plaintiff and defendant (pp. 135-137, 441, 451, 455) and between the defendant and the Government (pp. 133-137) and it is clear that he brought about the investigation which resulted in a suspension of the work in March, 1912. He was finally dismissed from the work and from the employ of the plaintiff (pp. 81, 133, 136, 166) by its

president, Mr. Converse. Mr. Guerini was the vice-president of plaintiff with "purely nominal duties," and his position with respect to this work was as a "moulder (modeller) and artist" (Converse, pp. 92, 169).

Early, the president of the plaintiff (Mr. H. P. Converse), appeared as the financial backer of Artist Guerini (p. 140) first as a *quasi* partner (p. 139) and later as chief executive officer of the plaintiff (p. 92). He was a builder of considerable experience, since 1887 (pp. 91-92, 151).

The original idea had by defendant and Mr. Guerini was that the exterior or decorative part of the building was to be built of cast-blocks of artificial stone, which were to be set like cut-stone (pp. 277-279, 38, 64-66, 142-144), and this explains why the defendant urged an early start to Porto Rico (pp. 386, 277-278, 279-280), and why the plaintiff made an early start (pp. *supra*, and pp. 37-38, 66, 77).

SUPERINTENDENTS—The defendant had as a superintendent, Mr. Oaksmith, a mature man who had twenty years of experience (p. 232) in the United States, Cuba, Africa and Porto Rico in buildings of stone, steel and concrete (p. 230).

The plaintiff's superintendent, Mr. Follett, was Mr. Converse's nephew, a young man who had been for five years in several colleges in different courses of study and had not graduated; and who had been timekeeper and various other things—and who was exceedingly loath to tell what he had ever done personally (pp. 59-63) except that he was the man in charge; and whose uncle was likewise loath to tell about his nephew (pp. 128-131).

There was certainly something wrong in this young man's experience. How little he knew about

the work is disclosed by his cross-examination (pp. 44-88, 203-206).

The conditions attending the work is found almost exclusively in the testimony of Messrs. Oaksmith and Follett who were resident at San Juan. Messrs. Carlin and Converse had little knowledge of what took place on the work as their knowledge was limited to a few visits; and this accounts for the exclusion of much of the exhibits which were letters written by them at Boston and New York, reciting facts of which they had no personal knowledge.

Mr. Oaksmith's testimony is founded upon written daily reports (pp. 251, 253), and Mr. Follett's upon nothing so far as disclosed, except a half dozen letters which are in evidence. His memory was extremely poor and faulty. Messrs. Carlin and Converse are virtually parties to the suit and Messrs. Oaksmith and Follett were employees respectively of the parties.

GOVERNMENT BUILDINGS—The Government Post Office at San Juan was a departure from the ordinary construction of public buildings adopted in the United States, due largely to the absence of a suitable building stone in the island of Porto Rico or the islands adjacent thereto. The foundations are in concrete and the exterior of the basement and the approaches, including the steps, are in granite. The exterior for the superstructure, however, is in imitation sandstone, made from sand and native materials colored in imitation of the red or brown sandstone of Connecticut and New Jersey.

The manufacture of artificial sandstone for decorative exteriors is comparatively new in this country, and but few contractors have had experience in

it, and the Government was particularly insistent in the contract and through its architect on having samples submitted, in order to determine the color, finish and character of the artificial stone which the contractor undertook to provide and furnish, and these samples and the method of joining the stone or connecting the succeeding day's work was the subject of much study, correspondence and discussion, and a source of some anxiety to the builders.

One Anable Guerini, an Italian, had done work for the Government at West Point. He was an artist and an alleged expert in the manufacture of artificial stone, particularly for decorative purposes, and part of the imitation sandstone for this structure was decorative in the sense of being moulded into cornices and other architectural features, and a contract was made and entered into between the defendant and Mr. Guerini for this imitation stone work. Mr. Guerini, not having the requisite capital, secured the financial backing and assistance of one Mr. H. P. Converse, of Boston, and the plaintiff was duly incorporated under the laws of the State of Massachusetts as the Guerini Stone Company, with Mr. Converse as president; Mr. Guerini as vice-president, and Mr. Bliss, associated with Mr. Converse, as treasurer, and this plaintiff undertook to do this imitation sandstone work and the concrete for the building in question.

Some of the questions involved in this case are the following:

(1) The defendant did not delay the plaintiff in the performance of its contract between January and September 15, 1911.

(2) The defendant did not delay the plaintiff in its work between September 15, 1911, and March 9, 1912.

(3) The plaintiff was not warranted in terminating, rescinding or breaking its contract by reason of the circumstances and conditions existing or of any act of omission on the part of the defendant between March 9 and May 22, 1912.

(4) That the plaintiff was not justified in terminating, abandoning, rescinding or abrogating its contract.

(5) That the plaintiff was estopped by its conduct and its notices to defendant from terminating, rescinding or abrogating its contract on May 22, 1912.

(6) That the contract by its terms contemplates delays such as occurred during the plaintiff's operations, and they could not be made the excuse for the termination of plaintiff's contract.

(7) That the causes of the delay subsequent to March 7, 1912, were expressly provided for in the contract and precluded and forbade the act of termination of the contract by the plaintiff.

(8) That there was no delay or default on the part of the defendant in making monthly or progress payments to the plaintiff that would warrant the plaintiff in terminating, rescinding or abrogating its contract.

(9) That the verdict of the jury is excessive, unwarranted and was evidently given under the influence of passion and prejudice.

(10) That the claim of plaintiff against the defendant was unliquidated and that no interest can be charged upon the verdict.

(11) That the date from which the interest is reckoned by the jury is not the correct date.

Specifications of Error.

(REFERENCES ARE TO MARGINAL PAGES.)

The plaintiff-in-error sets forth the following specifications of error relied upon, all of which were incorporated in the *Assignment of Errors:*

The contract anticipated delays and provided for them, and the measure of damage which should compensate the plaintiff for injuries caused by delays chargeable to defendant.

When the parties to a contract have made provision for delays and established by their agreement a measure of damages for delays, the Court may not deprive either party of the protection of his contract, nor impose a different measure of damages than that provided in the contract.

I. The Court erred in denying defendant's motion to dismiss the complaint at the close of plaintiff's case, wherein defendant claimed the protection of its contract with plaintiff, as follows:

> "My point with respect to all three causes of action, which are prefaced upon Paragraph 11 of the contract, which recites: 'The

general contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure to do so, thereby causing loss to the subcontractor, agree that they will reimburse the subcontractor for such loss.'

"Now, my point is, I maintain that the contract anticipated delays by the general contractor, and provided a means and a measure to reimburse the subcontractor for any delays that took place, such as the failure to provide materials and labor, and the United States Supreme Court has extended that phrase or clause, as it would seem, in its opinion, to the failure to provide foundations for the work.

"The parties have made provision in this contract for delays. They have rendered it entirely proper, entirely within the province of either party, to delay this work, and they have stated and recited a measure by which any damages that accrued should be and shall be measured. That clause in the contract is a protection to the owner, to the contractor, from this very kind of actions and suits, and is a provision which the Court may not take away from the parties.

"If that be true and the parties anticipated delay, and made provision for it and established a measure by which recompense and damages could be made and had, then any act of the defendants which delayed this work could not be a breach of the contract and could not be an act which would warrant the termination or rescission of the contract, because the parties have

specifically provided for delays and anticipated them and provided a means and a measure by which they should measure the damages.

"If this general contractor has failed to furnish any labor or materials, or the foundation that the Supreme Court embodies in it, then that act on its part was entirely within the contract, within the general contractor's rights and province under its terms, and could not be considered by the Court to be a breach of its contract. If it was not a breach of its contract, it cannot be made a reason or a cause for the termination of the contract by the other party.

"To my mind, as I regard this, it was a fatal and most unfortunate step for the plaintiff to have rescinded, terminated and cancelled this contract. He took right away from himself, when he did that, the provisions of the contract granting and giving to him recompense for his losses and damages. If the defendants have done nothing but fail to furnish labor and materials, it is not a breach of the contract, as I say, because it is embodied in the contract and provided for. Now, we will apply that argument to all three of these causes of action" (pp. 209-211).

II. The Court erred in giving the following instructions to the jury, as requested by plaintiff:

(a) "1. You are instructed that by the express terms of the 11th paragraph of the contract between the parties the defendant was under the obligation to 'provide all labor and materials not included in this

contract in such manner as not to delay the material progress of the work.' Applying this to the facts of the case, defendant was bound to furnish the foundation in such manner that plaintiff might build upon it without delay. And, if defendant failed to furnish the foundation in such manner, it is liable to plaintiff for loss thus caused to it.

"Furthermore, in case defendant, by failing to provide labor and materials, including the foundation, delay plaintiff to the extent of preventing plaintiff from completing its work within the contract period (or at most a reasonable extension thereof), then and in that case defendant is liable to plaintiff for all reasonable expenses incurred, including the unavoidable losses incident to stoppage, and also the profits, if any, which plaintiff could have made if allowed to complete the work under the contract!

"Given, P. J. Hamilton, Judge" (pp. 351-352; exception allowed to defendant, p. 377).

(b) "2. 'It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant and unnecessary for the purpose

of carrying out the contract.' *U. S.* v. *Behan*, 110 U. S., 338.

"Given, P. J. Hamilton, Judge" (p. 352; exception to defendant, p. 377).

(c) "4. If you find that owing to the acts of the defendant the plaintiff was prevented from completing the work under the contract during the time set therefor by the contract, or a reasonable extension thereof, then the defendant was guilty of a breach of the contract, and justified the plaintiff in stopping work under the contract, and entitles it to recover from the defendant such damages as may be proper on the evidence and under the instructions.

"Given, P. J. Hamilton, Judge" (pp. 352-353; exception to defendant, p. 377).

III. The Court erred in refusing the following instructions to the jury requested by defendant:

(a) "7. The Court instructs the jury that plaintiff was not justified in rescinding or terminating the sub-contract because of the alleged lapse of time.

"Refused, P. J. Hamilton, Judge" (p. 356; exception to defendant, p. 377; Assignment of Error 41, p. 485).

(b) "11. The Court instructs the jury that as a matter of law under the evidence adduced in this case, it must find the issues herein in favor of defendant upon the cause of action attempted to be set forth against defendant in the complaint filed by plaintiff; the only matter to be decided by you is what damage, if any, you may believe under the evidence in this case defend-

ant has suffered by reason of the abandonment by plaintiff of the plaintiff's sub-contract with defendant.

"Refused, P. J. Hamilton, Judge" (p. 357; exception to defendant, p. 377; Assignment of Error 43, p. 485).

IV. The Court erred in giving the following instructions to the jury:

(a) "'A contract is an agreement by two people to do a certain thing for a certain consideration. That is all a contract is. And it may be for the making of a pair of shoes, or it may be to put up a federal building. The principle is identically the same. When people enter into a contract, they have got to carry it out. If little things occur in the course of a large contract, it does not justify either one side or the other in throwing up the contract. If he does, he is liable in damages in his turn, but there is, of course, a limit to forbearance in a case of that sort and in all cases'" (pp. 363-364; Assignment of Error 10, p. 473).

(b) "A contract, if it is broken in a material part, in a substantial part, so that it does not make the same contract, that is the test, it can be thrown up by the party who is injured. He has a right to do it. There are two ways of doing it. He may rescind the contract and seek what is called a *quantum meruit* of what he has earned on it. That is one way of getting at it. Another way is to take the contract as a whole, terminate it, and then the measure

of damages is double. The man who is injured, if that be the case, is entitled to be put back where he was. You can see that is the substance, that is the object of all law" (p. 464; Assignment of Error 11, p. 473).

(c) "The object is to put a man back where he was, to reimburse him, and when it comes to a violated contract, there are two lines of recovery. He is entitled to recover what he has lawfully expended in trying to carry out his contract. That would cover a number of things. It would cover his own labor. It would cover the labor that he has put on the job. It would cover the material that he has supplied, and perhaps one or two other things, but that would be the substantial feature of it on that line" (p. 364; Assignment of Error 12, p. 473).

(d) "The other line of recovery is that where he can show that he would have made a profit, he is entitled to the profit that he has been prevented from obtaining. He can recover what he has actually lost in money or labor or material, and he can recover what he would have made if the other party had permitted him to carry on the contract" (p. 364; Assignment of Error 13, p. 474).

(e) "It is impossible to foresee beforehand all the delays that may occur, but if it was evident to the parties that there would be a long delay or an indefinite delay, or if it was evident that it was impossible to tell when the work could be begun again, then the Guerini Stone Company had

a right to terminate the contract. They were not bound to wait around here and await the pleasure of the Government, pleasure no doubt properly exercised, as to the beginning of the work" (p. 369; Assignment of Error 19, p. 476; exception to defendant, p. 379).

(f) "It seems that some arrangement was made between the Government and the Carlin Company as to underpinning the work, and this was arranged somewhere about May. But if you think from the evidence that that was not a matter of a few days, that it was uncertain when that would be finished, then the Guerini Stone Company had the right to do what they did on May 22nd, that is, to give notice to the Carlin Company that the contract, so far as they were concerned, was terminated, and that they would hold the Carlin Company responsible for the damages" (pp. 369-370; Assignment of Error 20, p. 477; exception to defendant, p. 379).

(g) "Now, on May 22nd, this contract was terminated by the Guerini Stone Company, and one of two things resulted. The result, if the Guerini Stone Company is correct, is that they must be repaid for the expenditures which they laid out in connection with this work, all told, less whatever material was left on hand and could be utilized. Or, if it is in evidence before you that certain material, that is, plant, was to be turned over to the Carlin Company and the Carlin Company used it, of course the Carlin Company ought to pay for that too. And profits, if

they are shown" (p. 370; Assignment of Error 21, p. 477).

(h) "On the other hand, suppose that the Guerini Company did not have the right, it was no right under the circumstances, to terminate the contract when they did, then they not only lose whatever they put into it, but, by the very words of their contract, they are bound to pay the Carlin Company whatever the Carlin Company is out by not having the contract carried through, the usual agreement, of course. So you see it is of vital importance to determine who was to blame in terminating this contract on May 22nd" (p. 370; Assignment of Error 22, p. 477).

(i) " 'When one party enters upon the performance of a contract, and incurs expense therein, and being willing to perform, is without fault of his own, prevented by the other party from performing, his loss will consist of two distinct items of damage; 1st, his outlay and expenses, less the value of materials on hand; 2nd, the profits he might have realized by performance, which profits are related to the outlays and include them and something more. The first item he may recover in all cases, unless the other party can show the contrary; and the failure to prove profits will not prevent him from recovering it. The second he may recover when the profits are the direct fruit of the contract, and not too remote or speculative. In an action for breach of a contract by wrongfully putting an end to it, the party committing the wrong is estopped from

denying that the other party has been damaged to the extent of his actual loss and outlay fairly incurred'" (p. 371; Assignment of Error 23, p. 478; exception to defendant, p. 379).

(j) "As to the matter of foundations, if you find that the Carlin Company failed to furnish the Guerini Company with foundations upon which to put their work, and on May 22nd it was in such indefinite shape that the Guerini Stone Company could not tell when they could begin their work, that was unintentional no doubt, but still it was a breach of the contract between the Guerini Company and the Carlin Company that would justify the Guerini Company in declaring the contract at an end. That, however, is for you to determine. That is the question of the termination of the contract, whether the Guerini Company had the right on May 22nd to terminate the contract, I leave that branch of the case in your hands" (p. 373; Assignment of Error 28, p. 480; exception to defendant, p. 379).

(k) "Returning now to the question of damages, supposing the first point to be settled in your minds, which I do not direct you at all is settled, in estimating the recovery to which the plaintiff is entitled, if you find he was justified in terminating the contract as he did on May 22nd upon the principles above given you, you can consider the reasonable expenditures incurred by the plaintiff, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was

actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract. So the different items that you may, if you come to the question, take into account are the outlays less the material on hand, the amount of work actually performed and the profits, if you find there were any, which were not speculative" (p. 374; Assignment of Error 30, p. 481; exception to defendant, p. 379).

(l) "The provision of the contract between the P. J. Carlin Construction Company and the Guerini Stone Company covering extensions of time beyond the term stated in the contract to the subcontractor is not exclusive and does not bar the subcontractor from other remedies" (p. 374; Assignment of Error 33, p. 482).

V. The Court erred in admitting evidence of damages as for breach of contract by defendant over the objection and exception of defendant's counsel on the grounds that "it was not the proper measure of damages or recovery," as follows:

(a) "Q. Can you testify the total amount that was actually charged the Guerini Stone Company by H. P. Converse & Company for the use of that machinery? A. I can.

"Q. What is it?

"Mr. Wait: I object. It is no proper measure of damages.

"The Court: The objection is overruled.

"Mr. Wait: Note an exception.

"A. It is composed of two bills to the Guerini Stone Company, one for 208 days at $15 a day, making $3,120, and one for 179 days at $15 a day, making $2,685, making a total of $5,805" (p. 113; Assignment of Error 65, p. 493).

(b) "Q. Now, can you tell the jury what those tools consisted of?

"Mr. Wait: The same objection * * * No proper measure of damages.

"The Court: The objection is overruled and exception allowed" (p. 113; Assignment of Error 65, p. 493).

(c) "Q. Now, Mr. Converse, how many days did you actually spend on the job in Porto Rico in connection with the work of the Guerini Stone Company?

"Mr. Wait: I object to that as immaterial. It is not proper measure of damages, and no proper charge to the defendant.

"The Court: The objection is overruled.

"Mr. Wait: Note an exception.

"A. I spent 66 days; my time on the job actually charged to the Guerini Stone Company.

"Q. At what rate?

"Mr. Wait: The same objection * * * and an exception.

"The Court: The objection is overruled.

"A. $25 per day.

"Q. And how much is the total of that?

"Mr. Wait: The same objection * * *

"The Court: The objection is overruled and exception allowed.

"A. There were 70 days in all at $25 a day, I make that correction, the number of days at a total cost of $1,750" (p. 114; Assignment of Error 66, p. 493).

(d) Witness H. P. Converse: "I know the amounts that were actually expended by the Guerini Stone Company in Boston in connection with this job. I have a memorandum here from which I can refresh my recollection as to the amounts.

"Q. Will you produce them? A. I can testify to the amount of invoices paid at the Boston office on account of this contract.

"Q. What is the amount?

"Mr. Wait: I object to them as being immaterial and not proper measure of proving damages or profits. They are not a proper measure of any damage for a breach of contract.

"The Court: I think the examination has progressed far enough for counsel to tell me his theory of damages. I have been waiting for evidence to get in, so that I could get the drift of it. Perhaps it would be better at this point to let me know your theory on that point (addressing the plaintiff's counsel). The jury is excused from the room during the discusssion" (pp. 114-115; Argument, pp. 115-120).

"Q. Were these memoranda made under your supervision, Mr. Converse? A. They were, and at the time they were made I was familiar with the facts set forth.

"Q. Did you know at the time these memoranda were made that they were correct?

"Mr. Wait: I object to that. He must show who made them and how he knows that they were correct, and if he did not make them he cannot know that they are correct, and I am satisfied that he did not make them.

"The Court: The objection is overruled.

"Mr. Wait: Note an exception.

"A. I did.

"Q. Are you able to testify of your own knowledge as to the facts set forth in the memoranda by refreshing your recollection from the memoranda?

"Mr. Wait: Note an objection and an exception.

"A. I am.

"Q. Now, did you testify as to the amount of the invoices paid at the Boston office? A. I think I did.

"Q. Will you state it again?

"Mr. Wait: I object on the ground stated.

"The Court: The objection is overruled.

"Mr. Wait: Grant me an exception.

"A. I have before me.

"Q. Give me the amount. A. $1,135.13" (pp. 120-121; Assignment of Error 66, p. 493).

(e) "Q. Now, can you testify as to the amount, can you give the amount of the freight and passenger fares paid at the Boston office on account of materials and men sent to Porto Rico in connection with the work on the Post Office and Federal Court Building in San Juan? A. I can.

"Q. Will you state the amount?

"Mr. Wait: Objected to as not the proper measure of damages or a measure by which damages can be determined, not being any part of the building structure and not being justifiable charges either against the defendants or for their account.

(Argument).

"The Court: The objection is overruled. It seems to me that, apart from the ground on which it is offered, it might be legitimate another way. There are certain profits claimed, and the elements making up the profits are certain estimated expenses. If it is shown that those expenses are larger for having to send men here, it may be that this evidence is legitimate in mitigation of profits. I do not know, but at all events it will be admitted.

"Mr. Wait: Note an exception.

"A. $1,117.23 for transportation charges of freight and men in connection with our contract on the new Federal Building in San Juan. This is a bill of the H. P. Converse Company to the Guerini Stone Company, O.K'd by its President" (p. 122, Assignment of Error 67, p. 494).

(f) "Q. Now, do you know the amount of payroll paid at Boston on account of laborers employed on the work on the Post Office Building at San Juan? A. I do.

"Q. How much is it?

"Mr. Wait: I object, if the Court please. No proper foundation, and it is not a proper measure of damages. Also, it should be shown that the witness paid it himself, or

that he knows that it went, of his own knowledge, to these people.

"Mr. Paine: He says that he knows.

"Mr. Wait: His saying that he knows doesn't make it out. There should be a foundation laid for it.

"The Court: The objection is overruled.

"Mr. Wait: Note an exception.

"A. There are several items. I will take them up in order. Feb. 16, the sum of $1580 payroll paid on account of Guerini's services, but paid to his wife * * *" (p. 126; Assignment of Error 68, p. 494).

(g) "Q. Were they in your opinion reasonably necessary for use on the job?

"Mr. Wait: I object to that; that is for the jury to determine.

"Mr. Wait: Note an exception.

"A. They were.

* * * * * *

"Q. In your opinion were they reasonably neecssary for the work on the building?

"Mr. Wait: The same objection and an exception.

"A. Yes, sir, they were.

* * * * * *

"Q. In your opinion was it reasonably necessary to use on the building?

"Mr. Wait: The same objection and an exception.

"A. Yes, sir.

* * * * * *

"Q. In your opinion was that necessary to use on building?

"Mr. Wait: The same objection and an exception.

"A. Yes, sir.

"Q. Was that cement and plaster, in your opinion, reasonably necessary for use on the building?

"Mr. Wait: Same objection and exception.

"A. It was necessary * * *

"Q. In your opinion was it reasonably necessary?

"Mr. Wait: The same objection and exception.

"A. Yes, sir; the amount was $19.20.

* * * * * *

"Q. Now, I ask you again, in your opinion were the materials purchased and the labor provided reasonably necessary for your work on the Post Office Building? Were the prices paid reasonable?

"Mr. Wait: I object, if the Court please, that is for the jury to determine. It is not a question for the witness. He is not qualified, and on the further ground that it is immaterial and not the proper measure of damages, and I make this objection apply to all that data, as I did when Mr. Converse gave it, as not being the proper measure of damages.

"The Court: The objection cannot date back. It will be good for the present question.

"Mr. Wait: I make it at this time.

* * * * * *

"The Court: The objection is overruled.

"Mr. Wait: Note an exception.

"A. They were" (p. 196; Assignment of Error 77, pp. 500-501).

(h) "Q. Will you state the amount paid by you for labor at San Juan? A In addition to my pay, I paid $11,379.21.

"Q. Now, can you give to the jury the total of the amounts you have just testified to, that was actually paid out in cash in San Juan? A. I actually paid out $25,303.22.

"Q. Now, I ask you again, in your opinion were the materials purchased and the labor provided reasonably necessary for your work on the Post Office Building? Were the prices paid reasonable?

"Mr. Wait: I object, if the Court please. That is for the jury to determine, it is not a question for the witness. He is not qualified, and on the further ground that it is immaterial and not the proper measure of damages, and I make this objection apply to all this data, as I did when Mr. Converse gave it as not being the proper measure of damages.

"The Court: The objection cannot date back. It will be good for the present question," etc. (p. 199; Assignment of Error 78, p. 501).

(i) "Mr. Paine: Q. Do you know the fair and reasonable value of those materials in San Juan in June, 1912? A. I made my value at that time $3,500. As far as I know, these articles were not returned to the Guerini Stone Company.

"Mr. Wait: I would like to renew my objection and move to strike out that price of $3,500 on the same ground, that it is not within the pleadings and it is not material

as far as the measure of damages is concerned.

"The Court: The motion is refused.

"Mr. Wait: Note an exception.

"Q. After August 6, 1912, do you know whether the value of these tools and materials was charged by the Guerini Stone Company to the P. J. Carlin Construction Company?

"Mr. Wait: Objected to as immaterial.

"The Court: The objection is overruled.

"Mr. Wait: Note an exception.

"A. They were.

"Q. And is there inclumded as part of these materials the machinery, etc., which Mr. Converse testified was rented to the Guerini Stone Company by H. P. Converse & Company, at the rate of $15 per day?

"Mr. Wait: Objected to as immaterial.

"The Court: The objection is overruled.

"Mr. Wait: Note an exception.

"A. I don't understand.

"Q. Is it included in this list?

"Mr. Wait: The same objection and an exception.

"A. They were part of the tools in that list, at the rental price.

"Q. Were those tools included in this inventory? A. Yes, sir.

"Mr. Wait: The same objection and an exception" (p. 202; Assignment of Error 81, pp. 503-504).

The Trial Court erred in leaving numerous matters and questions to the jury which were not disputed and where the evidence was uncontradicted; they

being questions of law for the Court on undisputed facts.

VI. The Trial Court erred in submitting questions and matters to the jury which were questions of law based upon undisputed facts, as follows:

(a) In the Court's charge that:

> "Now, that is the contract. The facts seem to be that in January, 1911—now, this contract was the 16th of December, 1910—the next month a telegram was sent to the Guerini Company and what the meaning of that telegram was is for you to determine in view of all the circumstances of the case. Was it a notice to them to start work, or was it simply a general notice in connection with the work?" (p. 366; Assignment of Error 14, p. 474).

(b) In the Court's charge that:

> "On September 15th, was another communication between the parties, and that is one of the dates you may determine or may not determine was that upon which the notice called for in the contract to begin work is to be dated from, September 15th. You are to take that matter and determine whether that was a notice to begin work, or whether it began farther back" (p. 367; Assignment of Error 16, p. 475).

(c) In the Court's charge that:

> "The contract says that work shall be begun upon three days' notice, etc. You are to determine when that notice was given" (p. 371; Assignment of Error 24, p. 478).

(d) In the Court's charge that:

"The payment provided for is 85% of the work put into the building, but it is to be to the satisfaction of the general contractor. I charge you that that is to be reasonably construed. It does not mean that Carlin or the defendant company can just say: I will not approve this voucher. If it is shown that there was 85% done, or whatever is shown to have been done, to the extent of 85% the Carlins are bound to pay monthly, provided the proper voucher has been furnished. It is for you to say whether there is such proof in the case. But the satisfaction of the Carlin Company is to be a reasonable satisfaction" (p. 371; Assignment of Error, 25, p. 478).

(e) In the Court's charge that:

"There are two things in this case. Was the termination of the contract by the plaintiff on May 22d rightfully done? That is the first question before you talk about damages. Was the plaintiff right in terminating the contract? The question whether the plaintiff rightfully did that means that he could only do it if the defendant had himself broken the contract.

"A contract, as I explained to you, can be terminated only when some substantial part of it has been broken, and it is sometimes quite difficult to draw the line, but I charge you that there are two or three things which may be taken into account by you as a breaking of this contract, that is, two or three lines of proof which you may

or may not think amount to the breaking of this contract by the Carlin Company" (p. 372; Assignment of Error 26, p. 479).

(f) In the Court's charge that:

"As to the matter of foundations, if you find that the Carlin Company failed to furnish the Guerini Company with foundations upon which to put their work, and on May 22d it was in such indefinite shape that the Guerini Stone Company could not tell when they could begin their work, that was unintentional no doubt, but still it was a breach of the contract between the Guerini Company and the Carlin Company that would justify the Guerini Company in declaring the contract at an end. That, however, is for you to determine. That is the question of the termination of the contract, whether the Guerini Company had the right on May 22d to terminate the contract. I leave that branch of the case in your hands" (p. 373; Assignment of Error 28, p. 480).

(g) In the Court's charge that:

"If you find that the defendant failed to make payments as called for by the contract, not over 85%, and not otherwise in pursuance to the contract, on account of work done by the plaintiff in accordance with the terms of the contract, such failure constitutes a breach of contract on the part of the defendant, and justified the plaintiff in stopping work under the contract, and entitles it to recovery from the defendant of damages" (pp. 373-374; Assignment of Error 29, p. 481).

(h) In the Court's charge that:

> "In case you find that the defendant broke its contract with the plaintiff and find a verdict for the plaintiff, you may allow the plaintiff interest at the rate of 6% per annum from the date of defendant's breach of the contract up to today upon that portion of plaintiff's damages which was at the time of the breach capable of being definitely ascertained by computation. You cannot, however, find for the plaintiff an amount greater than the amount demanded in his complaint as amended" (p. 375; Assignment of Error 34, p. 482).

It was error to allow interest on a verdict for damages for the breach of a contract, which damages were assessed in gross by the jury in their verdict for $35,873.09.

It was error for the Court to leave to the jury the question of what portion of plaintiff's damages was at the time of the alleged breach capable of being definitely ascertained by computation.

VII. The Court erred in holding, ruling and instructing the jury as follows:

> (a) "10. I charge you that in case you find that the defendant broke its contract with the plaintiff, and find a verdict for the plaintiff, you may allow the plaintiff interest at the rate of 6% per annum from the date of defendant's breach of the contract up to today upon the portion of plaintiff's damages which was at the time of the breach

capable of being definitely ascertained by computation. You cannot, however, find for the plaintiff an amount greater than the amount demanded in his complaint as amended.

"Given, P. J. Hamilton, Judge" (p. 354; exception to defendant, pp. 377-378).

(b) "In case you find that the defendant broke its contract with the plaintiff and find a verdict for the plaintiff, you may allow the plaintiff interest at the rate of 6% per annum from the date of defendant's breach of the contract up to today upon that portion of plaintiff's damages which was at the time of the breach capable of being definitely ascertained by computation" (p. 375; Assignment of Error 34, p. 482).

On the ground that interest is not recoverable upon a verdict for damages assessed by a jury, for the reason that the claim was unliquidated (see pp. 380-383).

(c) "8. The said Court erred in allowing interest on the verdict for damages as stated by the jury, for the reason that the said losses and damages were unliquidated and there is nothing to show what part of said verdict was for losses due to delay or what part was for prospective profits or otherwise" (pp. 380-383; Assignment of Error 8, p. 472).

Any neglect or failure by defendant to make monthly or progress payments under the contract would not justify a

termination or rescission of the contract.

The measure of damages for withholding monthly or progress payments is the interest on the money withheld from the date when justly due.

Nothing short of an absolute refusal of the defendant to make monthly or progress payments manifestly due and owing to plaintiff, and after demand, would constitute a breach of contract on the part of the defendant.

No monthly or progress payments justly due from defendant to plaintiff were withheld by defendant.

VIII. (a) The Court erred in its instruction to the jury that:

> "On the other hand, if the payments were not properly made, that may amount, if it was as a substantiated lack of payment, default in payment, to breaking the contract. A contract like this is not made for fun or the honor of putting up a building. That is not it. A contractor does certain work in order to secure certain money just like everybody else who does certain work in order to get certain pay. And if there is a substantial failure, amounting substantially to the withholding of the whole payment, not necessarily the whole payment, but the bulk of the payment, a man is not bound to go on with a contract under those conditions. You will find that that will depend a great deal upon the question that I called your attention to, whether there was an agreement as to units or not. If there was an agreement as to

units, you will have to take one view of the case, and if you find that there was not, you will have to take another view of the case as to the question of payments. I call it to your attention as being one of the grounds which may or may not exist for Guerini declaring that Carlin had broken this contract" (p. 373; exception to defendant, p. 378; Assignment of Error 27, p. 480).

(b) The Court erred in refusing to instruct the jury that:

"10. The Court instructs the jury that the delay of defendant to make payments on estimates, in the absence of a positive refusal to pay anything, was not ground for a rescission or termination of the contract by plaintiff. The remedy of plaintiff was, and is, to recover interest on such deferred payments. Neither would such delay in making payments upon estimates be a cause for awarding any interest under the pleadings in the present action.

"Refused, P. J. Hamilton, Judge" (p. 356; Assignment of Error 42, p. 485; exception to defendant, p. 444).

(c) The Court erred in refusing to instruct the jury that:

"13. The Court instructs the jury if you believe from the evidence that defendant delayed in making payment of the estimates and requests presented by plaintiff, still, if you believe that these requests or estimates were the subject of *bona fide* investigation and discussion, the plaintiff was not justified

in rescinding or terminating the sub-contract.

"Refused, P. J. Hamilton, Judge" (p. 357; Assignment of Error 45, p. 486; exception to defendant, p. 378).

(d) The Court erred in refusing to instruct the jury that:

"27. No monthly or progress payments were due to the plaintiff from the defendant until a written requisition on a form supplied by the defendant, had been made by plaintiff to defendant, which first application was made Dec. 30, 1911.

"The withholding by defendant of a part of the monthly or progress payment due Jan. 11, 1912, and of a substantial part of a payment due March 21st to May 22nd, 1912, is not a cause for a termination of the contract by plaintiff; nor will said withholding of payments give to plaintiff a right to prospective profits as for a breach of the contract on the part of defendant.

"Refused, P. J. Hamilton, Judge" (p. 361; Assignment of Error 54, p. 489; exception to defendant, p. 378).

(e) The Court erred in refusing to instruct the jury that:

"26. Plaintiff was not entitled to any monthly or progress payments until it had complied with those terms of its contract which entitled it to payment.

"The contract between the parties required as a condition to payment that the work should be to the satisfaction and un-

der the direction of the defendant and the architect, and agreeably to the drawings and specifications.

"Plaintiff must show and prove that the work was performed to the reasonable satisfaction of the defendants and the architect, before they are entitled to payments on account.

"Refused, P. J. Hamilton, Judge" (p. 361; exception to defendant, p. 378; Assignment of Error 53, p. 489).

(f) The Court erred in its instruction to the jury that:

> *"Then* the basis of payments in this case would be the basis stated in the main contract itself, and that was this: that the Guerini Stone Co. were to be paid monthly payments not exceeding 85% of the work actually done and put into the building, provided * * * that the work was to the satisfaction of the Carlin Co. Now if there is no variation of it, that was what the agreement was * * *. You will have to figure out and see whether the Carlin Co. did carry out the contract as to payments" (p. 368; Assignment of Error 25, p. 478).

(g) The Court erred in leaving the question whether or not the plaintiff had shown and proven "that the work was performed to the reasonable satisfaction of the defendant and architect," in its instruction to the jury that:

> "Plaintiff must show and prove that the work was performed to the reasonable sat-

> isfaction of the defendants and the architect, before it is entitled to payments on account" (p. 377),

and in refusing defendant's request for instructions No. 26 (p. 361); when there is no evidence whatever of such satisfaction of either the defendant or the Government's architect; and when the Court had excluded evidence of the defendant's dissatisfaction (Exception, p. 294; Assignment of Error 88, p. 509), and of the dissatisfaction of the architect (p. 301; Exception, p. 301; Assignment of Error 89, p. 510). Neither is there any evidence that the work done was "perform(ed) and finish(ed) in a thoroughly workmanlike manner, under the direction and to the satisfaction of the" defendant and the architect (p. 12), but *all the evidence* is to the contrary (pp. 334, 68, 74, 76, 89, 134-137, 140-141, 243-244, 250, 301-302, 326, 452, 453, 456, 445), and that the plaintiff positively refused to follow the directions of the defendant (pp. 74, 244, 387, 453).

A verdict or finding by the jury that the plaintiff was justified in terminating the contract is against the instruction of the Court and against the evidence.

The damages assessed by the jury against the defendant in favor of the plaintiff are excessive.

What was a reasonable delay was a question for the Court, and the Court should have ruled and decided that a delay from March 9th to May 22nd, under the circumstances established by the

testimony and exhibits and under the terms of the contract, was not an unreasonable delay.

The verdict is against the law, against the evidence and the weight of evidence, contrary to the instructions to the jury, and excessive.

IX. The Court erred in denying defendant's motion to vacate, set aside and hold for naught the verdict of the jury and the judgment based thereon, and to grant to the said defendant a new trial (Motion, pp. 467-468, and Order, p. 468; Assignments of Error 100 and 101, p. 513).

On the grounds:

> (a) "Second: That the damages awarded by the jury in its verdict * * * against the defendant *are excessive,* appearing to have been given under influence of passion or prejudice."
>
> (b) "Third: That the evidence *adduced* * * * *was wholly insufficient* to justify the verdict of the jury, and
>
> (c) "that the said verdict *is against the law and the instructions given to the jury.*"
>
> (d) "Fourth: *For error in law* occurring at the trial, and excepted to, at the time, by the said defendant" (pp. 467-468).

X. The verdict of the jury in favor of the plaintiff was manifestly against the following instructions of the Trial Court for the reason that under these instructions and the evidence there was no breach of the contract by defendant and therefore

no justification of the rescission or termination of the contract by plaintiff:

(a) "5. The Court instructs the jury that even if there was any delay caused by defendant to plaintiff prior to the acceptance by the latter of the option exercised by defendant to require the plaintiff to set the granite in September, 1911, such an acceptance by plaintiff of said options constituted a waiver of all claims or complaints which it might theretofore have had, and constituted an estoppel to prevent plaintiff from claiming delay up to said date, so far as relates to termination of the contract.

"Given, P. J. Hamilton, Judge" (p. 355).

(b) "9. The jury will not consider evidence of any facts or transactions between the parties occurring subsequently to May 22, 1912, the date the plaintiff rescinded or terminated the contract.

"Given, P. J. Hamilton, Judge" (p. 356).

(c) "14. The Court instructs the jury that if you believe from the evidence that the unit of $1.07 per cubic foot for the concrete work done by plaintiff, and for which plaintiff demanded payment based upon such unit, was in excess of the unit recognized by the sub-contract for such concrete work; or if you believe from the evidence that the Government of the United States, by its representatives, established between it and the defendant a lower unit for such concrete work done by plaintiff, then plaintiff was not entitled to payment for such

concrete work on the basis of the said unit price of $1.07.

"And you are further instructed that the fact that the defendant may, by error or miscalculation of the Government, have received an overpayment from the Government on account of such concrete work done by plaintiff—such overpayment being based upon the application of the unit of $1.07, plaintiff was not entitled to receive any part of such overpayment from defendant.

"Given, P. J. Hamilton, Judge" (p. 357).

(d) "19. The contract provided for delays due to failure of defendant to provide labor and materials, and provided that defendant should reimburse plaintiff for its loss; that such express provision in the contract shows that delays by defendant were contemplated by the parties and were anticipated and provided for.

"Under such provision of the contract, ordinary or usual delays in building constructions by the defendant would not constitute a breach of the contract on the part of the defendant.

"That only unusual and extraordinary delays by defendant, such as would not under the circumstances and conditions surrounding the parties have been reasonably contemplated or anticipated by the parties, would constitute a breach by defendant of its contract.

"Given, P. J. Hamilton, Judge" (p. 359).

(e) "20. Breaches of a contract may be waived or condoned by either party, and

even if you should believe that the defendant had given cause to plaintiff to complain and to withdraw from the sub-contract, if you find, however, that the plaintiff continued with the work for many months thereafter, such delays may not be made a cause for termination of the contract by plaintiff after it failed for a long period of time to terminate such contract.

"Given, P. J. Hamilton, Judge" (p. 360).

(f) "23. If the plaintiff had a just cause for rescission of its contract, or felt entitled to damages for delay on or before Sept. 15, 1911, it was incumbent upon plaintiff to give notice to defendant of its intention to rescind when called upon to do the additional work of setting of granite on or about Sept. 15, 1911, as aforesaid.

"Given, P. J. Hamilton, Judge" (p. 360).

(g) "24. If plaintiff contributed to the delay of which it complains, it cannot take advantage of such delay as an excuse for the termination of its contract.

"The plaintiff owed the same duty not to delay defendant's work as did defendant owe to plaintiff.

"Given, P. J. Hamilton, Judge" (p. 360).

(h) Instructions of the Court:

"The contract provided for delays due to failure of defendant to provide labor and materials, and provided that defendant should reimburse plaintiff for its loss. This shows that delays by the defendant were contemplated by the parties. That alone would

not constitute a breach of the contract unless it amounted to a substantial ending of the contract. Only unusual and extraordinary delays by the defendant, such as would not, under the circumstances and conditions surrounding the parties, have been reasonably contemplated or anticipated by the parties, would constitute a breach by defendant of its contract" (p. 377).

"Plaintiff must show and prove that the work was performed to the reasonable satisfaction of the defendants and the architect, before it is entitled to payments on account" (p. 377).

The plaintiff, by accepting and undertaking the contract for the setting of the granite, waived any delay or damage prior thereto.

XI. The Court erred in its refusal to instruct the jury as requested by defendant, that:

(a) "21. The act of plaintiff in undertaking and doing the setting of granite under the option exercised by defendant some time prior to Sept. 15, 1911, and without notice to defendant of any complaint as to delay or damages suffered by defendant, constituted a waiver of any such delay or damage to plaintiff prior thereto.

"Refused, P. J. Hamilton, Judge."

And,

(b) "22. The act of plaintiff in soliciting and making a proposal to set the granite and the steel erection to the concrete work,

is evidence of a waiver on the part of the plaintiff of any delays that may have occurred prior to said proposal of Aug. 17, 1911.

"Refused, P. J. Hamilton, Judge" (p. 360; Assignments of Errors 50 and 51, p. 488; see pp. 131-132, 159-162; but see Request 5, p. 355, given, and Requests 20 and 23, p. 360, and Instructions, p. 377).

NOTE.—The effect upon the jury of these charges and the refusals to charge cannot be estimated.

The defendant caused no delay to the plaintiff's work nor to the performance of its contract.

XII. The Court erred in its refusal to instruct the jury as requested by the defendant, as follows:

(a) "4. The Court instructs the jury that under the evidence it cannot find that defendant caused any delay to plaintiff prior to Oct. 16, 1911.

"Refused, P. J. Hamilton, Judge" (p. 355; Assignment of Error 39, p. 484).

(b) "7. The Court instructs the jury that plaintiff was not justified in rescinding or terminating the sub-contract because of the alleged lapse of time.

"Refused, P. J. Hamilton, Judge" (p. 356; Assignment of Error 41, p. 485).

(c) "11. The Court instructs the jury that as a matter of law under the evidence adduced in this case, it must find the issues herein in favor of defendant upon the

cause of action attempted to be set forth against defendant in the complaint filed by plaintiff; the only matter to be decided by you is what damage, if any, you may believe under the evidence in this case defendant has suffered by reason of the abandonment by plaintiff of the plaintiff's sub-contract with defendant.

"Refused, P. J. Hamilton, Judge" (p. 357; Assignment of Error 43, p. 485).

(d) "12. The Court instructs the jury that as plaintiff unjustifiably rescinded or terminated the sub-contract, defendant had the right under Section 5 of the sub-contract to retain any and all sums due the plaintiff, if any, until the completion of the work, and to apply the same upon the cost of doing the work provided for in the sub-contract.

"Refused, P. J. Hamilton, Judge" (p. 357; Assignment of Error 44, pp. 485-486).

NOTE.—The defendant contends that no verdict should have been rendered against it under the instructions of the Court, for the reason that plaintiff's recovery was undoubtedly based upon the verdict of the jury that plaintiff's work was delayed by defendant to such an "unusual and extraordinary" extent "such as would *not* under the circumstances and conditions surrounding the parties have been reasonably contemplated by the parties" (pp. 359, 377).

Any delays from January to September 15, 1911, were waived (pp. 284, 355-356, 360, 376-377).

Any delays from September 15, 1911, to March 9, 1912, were waived and condoned (pp. 359-360), and

were contributed to by plaintiff (see Argument, p. *infra*). The plaintiff had full swing and full control of the building and its site (pp. 41-42, 82, 83, 90, 233, 239, 260). The pretense that there was delay from non-delivery of granite was not proven. It was proven absolutely to the contrary (pp. 229, 233, 240, 260).

The delay from March 9 to May 22 was waived and condoned (p. 81) by the express written declarations of the plaintiff to defendant (pp. 383-384, 397, 384, 399), and by plaintiff's neglect and refusal to proceed with its contract work on April 17, as directed and ordered by defendant and the architect's representative (pp. 439, 450, 456).

XIII. The Court was requested to charge the jury that:

> (a) "under the evidence it cannot find that defendant caused any delay to plaintiff prior to Oct. 16, 1911" (p. 355),

and

> (b) "that as a matter of law under the evidence adduced in this case, it must find the issues herein in favor of defendant upon the cause of action attempted to be set forth against defendant in the complaint filed by plaintiff; the only matter to be decided by you is what damage, if any, you may believe under the evidence in this case defendant has suffered by reason of the abandonment by plaintiff of the plaintiff's sub-contract with defendant" (p. 357),

and that

> "as plaintiff unjustifiably rescinded or terminated the sub-contract, defendant had

> the right under Section 5 of the sub-contract to retain any and all sums due the plaintiff, if any, until the completion of the work, and to apply the same upon the cost of doing the work provided for in the sub-contract" (p. 357);

which requests were refused.

NOTE.—The defendant challenges the plaintiff to point out to the Court a word of competent evidence, oral or written, to establish that the defendant delayed the plaintiff's work for any. stated hours or days, or between any two dates, or how or by what means (pp. 212-214), and as stated by defendant's counsel in his motion to dismiss the case, the question of delay by defendant should not have been submitted to the jury (pp. 212-215).

It was error to exclude as an exhibit and from the consideration of the jury the testimony of witness Follett, the man in charge of the work and one person cognizant of any alleged delays during its performance, and which showed conclusively that the defendant did not delay plaintiff's work.

The Trial Court erred in excluding letters, proposals, account books and contracts that were material, competent and relevant to the issues in the case.

XIV. The said Court erred in excluding, over the objection and exception of the defendant, the testimony of one of the witnesses transcribed by the official stenographer, as an exhibit and for the purpose of showing that there was no evidence in his testimony of any delay on the part of the de-

fendant for any definite period of time or between any two dates or with respect to any definite matter, as set forth in the record, as follows:

(a) "Mr. Wait: I don't know what the practice is here. I have had Mr. Follett's testimony transcribed, and I offer it in evidence so it can be taken to the jury room.

"The Court: Well, what do you want done?

"Mr. Wait: It is the official stenographer's minutes transcribed. I would like to have the jury have the benefit of this transcription of the testimony, if they desire it, comprising Mr. Follett's testimony, and I ask that it be admitted so that, together with the exhibits already offered in evidence, it may go to the jury room.

"The Court: In that shape the offer would be refused.

"Mr. Wait: Should I call the stenographer and have him testify that he transcribed the minutes, in order to qualify them?

"The Court: No, not on that point. Our practice is that if the jury wants any part re-read to them, they will come back in and the stenographer will read it to them, but in taking out a part of the oral testimony, it amounts to laying undue weight on that point.

"Mr. Wait: Not undue weight on one of my witnesses' testimony, but on one of my opponent's witnesses, for which he ought to be very grateful.

"The Court: If the jury want to hear it re-read at any time, let them come back.

"Mr. Wait: Kindly note an exception.

"The testimony in question was then marked No. 20 for the defendant for identification.

"Mr. Wait: I now offer Exhibit 20 for identification.

"The Court: That is the same point. I hold the same way.

"Mr. Wait: Note an exception" (pp. 348-349; Assignment of Error 96, p. 512; testimony of Follett, *infra*, pp. 36-91, 193-206, 346-347).

XV. The Court erred in refusing to instruct the jury as follows:

(b) "97. There is absolutely no evidence in the case of delays to plaintiff's work in the performance of its contract with the defendant, for any specific time or period, and no evidence of the acts, neglect or failure on the part of the defendant to do or to perform anything, such as the failure to furnish labor or materials or a stable foundation, that would cause delay to the plaintiff or give to plaintiff any justification for the termination of its contract" (p. 512).

(c) "98. There is not sufficient evidence in the case from which the jury could find that the defendant delayed the plaintiff, and this fact was called to the attention of the Court in the motion to dismiss and, at the conclusion of the trial, in the requests to instruct the jury, and there is no evidence of any act, default or neglect on the part of the defendant that would warrant the jury in finding that plaintiff was justified in

terminating its contract with the defendant" (p. 512).

(d) "99. The said Court erred in refusing to direct a dismissal of the complaint in the action below upon the grounds stated in defendant's motion for the dismissal of the action at the end of plaintiff's case" (p. 512).

(e) "90. The said Court erred in excluding, over the objection and exception of defendant's counsel a *bona fide* bid for the completion of the work described in plaintiff's contract after it had terminated its contract on May 22, 1912, on the ground that the said bid had not been accepted and acted upon, especially where the bid or estimate of plaintiff's President had been received in evidence as evidence of the cost of the work, and where estimates pure and simple had been received in proof of the probable cost to do and to complete work under the same contract which said proposal or letter was marked Exhibit 18 for identification," as follows:

"Q. Now, Mr. Carlin, after May 22, 1911, when the plaintiff quit the work here, did you secure any proposals or estimates for the completion of the Guerini Stone Co.'s contract? A. We did. We secured such a proposal from Purdy & Henderson, a firm of engineers located here in San Juan and who were doing a very great deal of work in the West Indies and who came originally from Chicago, and were still conducting extensive operations in the United States. They built here the Y. M. C. A. building,

the Royal Bank of Canada, the Ponce pier and two or three other contracts of similar size. They were familiar from their operations at the time they gave us this proposal with the prices in San Juan. They had done work of this character and large quantities of it. They were an established firm of reputation. We gave them the Government specifications and information about this contract that the Guerini Stone Co. had here, and they inspected the building to see how much had been done. They made us a proposal of the cost or estimate of what they would do the work for. That was made in good faith and *bona fide*.

"Q. I show you a letter of July 24, 1912, from Purdy & Henderson to the P. J. Carlin Construction Co., and ask you if that is the bid or estimate that you received? A. It is a copy of it.

"Mr. Wait: I offer it in evidence.

"Mr. Paine: I object to the admission of an unaccepted bid as evidence of the cost or value of doing work. This was offered at the first trial. It was a bid for doing this work which was not even accepted by the defendant, and in support of my objection I cite 191 U. S., 341.

"The Court: What does that hold?

"Mr. Paine: 'It is of a nature entirely too uncertain, shadowing and speculative to form any solid foundation for determining the value of the land which is sought to be taken in condemnation proceedings. If the offer were admissible not only is it impossible to prove the lack of good faith in the person making the offer, but the circum-

stances of the parties at the time the offer was made, as bearing upon the value of such offer, may be very difficult, if not impossible, to show. * * * In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication and even dangerous in their character as evidence upon this subject.'

"Mr. Wait: That sounds very good and had the defendant pursued the policy and the plan outlined there, I think I would have followed him, but he has put an interested witness, the plaintiff in the case, on the stand and has had him give an estimate of the value of the work upon which he prefaced damages against the defendant. It is nothing but an estimate and it was so stated. Now, here is an estimate which a man put his name to and offers and agrees to do this work at that price and makes a *bona fide* proposal. No better evidence could be had than to go to one of the best and foremost builders in the continent and get him to say what he would do that work for. It seems to me it is the best possible evidence of the fair and reasonable cost of it.

"The Court: The objection is sustained.

"Mr. Wait: Note an exception.

"Mr. Wait: I now renew the offer, if the Court please.

"Mr. Paine: I renew my objection.

"The Court: The objection is sustained. As I understand it, the offer was not accepted and was not carried out.

"Mr. Wait: Oh, no.

"The letter is marked: 18 for defendant for identification" (pp. 302-304; Assignment of Error 90, p. 510).

(f) "91. The said Court erred in excluding, over the objection and exception of the defendant, the ledger, journal and cash book of the defendant, upon the qualifications and foundations made and offered, where said books were used and offered merely to substantiate the disbursements made by the Secretary and Treasurer of the defendant company, and where such disbursements were chargeable to the plaintiff under the terms of the contract as 'the expenses incurred by the general contractors in finishing the work,' and said expenses are described as those incurred by the general contractor, either for furnishing material or for finishing the work, or any damage incurred through such default' by the plaintiff, as set forth in the record" (pp. 306-311; Assignment of Error 91, p. 510).

(g) "94. The said Court erred in excluding, over the objection and exception of defendant, the original contract between the defendant and Mr. A. Guerini for the completion of the contract which the plaintiff terminated, the same being marked Exhibit 19 for identification, as shown by the record" (pp. 338-340, 457-466; Assignment of Error 94, pp. 511-512).

The contradictions in the charge of the Trial Court were in themselves enough to warrant a reversal of the judgment in this case.

XVI. The said Court erred in its instruction to the jury that:

(a) "If a proper foundation was not furnished to them (plaintiff) and the Government stopped work on March 9th, and there was no reasonable prospect of their being able to begin work anew *within a reasonable time*, I charge you that would constitute on the part of the Carlin Co. a substantial breach of the contract with the Guerini Stone Co. If it was something that could be rectified *in a few days*, that would be a different matter. The contract contemplates a delay of a few days at a time. All large contracts must contemplate that" (p. 369).

(b) "It is impossible to foresee beforehand all the delays that may occur, but if it was evident to the parties that there would be a long delay or an indefinite delay, or if it was evident that it was impossible to tell when the work would be begun again, then the Guerini Stone Co. had a right to terminate the contract. They were not bound to wait around here and await the pleasure of the Government—pleasure no doubt properly exercised—as to the beginning of the work" (p. 369).

(c) "It seems that some arrangement was made between the Government and the Car-

lin Co. as to underpinning the work and this arrangement somewhere about May. But if you think from the evidence that it was not a matter *of a few days,* that it was uncertain when that would be finished, then the Guerini Stone Co. had the right to do what they did on May 22nd, that is, to give notice to the Carlin Co. that the contract, so far as they were concerned, was terminated, and that they would hold the Carlin Co. responsible for the damages" (pp. 369-370; exception to defendant, p. 379; Assignment of Error 19, p. 476; 20, p. 477).

NOTE.—The effect of these charges cannot be overlooked by the Appellate Court, for the Court will consider that the jury was comprised of Porto Ricans, some of them natives, and that these declarations of the Court in three different places, of a delay *of a few days,* was very pertinent and impressive, and the charge was not overcome by the later declaration at the request of the defendant (p. 377).

ARGUMENT.

POINT I.

There is no evidence, written or otherwise, that defendant by any act or omission delayed plaintiff in the performance of its work or in the fulfillment of its contract obligations.

The plaintiff's case of delay is established by *two* witnesses, Mr. Follett, plaintiff's man in charge (pp. 36, 62-63), resident at San Juan throughout the work (p. 132), and Mr. Converse, the president of plaintiff, resident in Boston (p. 92), but who made only three visits to San Juan and other parts of the island (pp. 93, 112, 114, 142), remaining a total of nine weeks (pp. 94, 112, 114, 142, 146) or a total of 66 days (p. 114). During five weeks of this time nothing but preparation of preliminary work was being done by plaintiff (p. 77), and plaintiff's officers saw and were fully cognizant of the situation and conditions from the beginning (pp. 68, 93-94, 162-163).

Defendant's counsel has been over *all the testimony as to delay,* also *all the evidence* contained *in the exhibits* that was admitted in evidence.

Follett on Delays.—Supplying Granite.—The first testimony that pertains to the element of time was with respect to furnishing granite to be set by plaintiff under a supplemental contract made about September 15, 1911 (pp. 38-39).

The Court should compare this witness' *facile tongued* testimony with his cross-examination about the delivery of granite (pp. 67-70).

Some more evidence upon which plaintiff's attorney anticipated the jury could find delays warrant-

ing a termination of its contract is found at pages 89-90, 90-91.

There was no difficulty in establishing the fact that witness Follett knew absolutely nothing about when the granite was delivered at the building (pp. 90-91).

Mr. Follett had no knowledge whatever of the deliveries of granite, as he confesses. Not an instance of delay is given. Not a circumstance, not a date, not a period, not a delay. Solely impressions from which a jury could not make a finding or base a verdict of delay. Compare it with defendant's testimony of deliveries of granite, which refute every conclusion of the witness.

Oaksmith says when he arrived, August 25, 1911, there were 125 blocks of cut granite (p. 229); that September 16, 1911, 164 pieces arrived (p. 233); the contract to set the granite was made September 15, 1911 (pp. 401-402, 387, 435); the stiff legged derricks were being converted and rebuilt into guy derricks at request and insistence of plaintiff August 26, 1911 (pp. 230-231), to September 23 or 24, 1911 (pp. 231-232); the granite setting started October 16, 1911 (pp. 38-39, 67-69, 233).

Mr. Follett says the bills of lading will show the deliveries of granite (fol. 203) and the bills of lading show the following deliveries:

1911, Aug. 12	136	pieces
1911, Sept. 22	316	"
1912, Jan. 11	433	"
1912, Mar. 13	20	"
1912, Apr. 13	1	piece

(pp. 240, 260).

The shipment of March 13, of 20 pieces, comprised stones broken at the job (pp. 240-241, 246)

that had been recut at Providence, R. I., U. S. A., and the last two shipments and a large part of the big shipment of January 11, 1912, were not used in the building proper, but were for the south approach to the building, which the plaintiff did not do at all (p. 240).

The *plaintiff* shows that practically all the granite *in the building* was set by or before January 25, 1912 (pp. 260-261), and perhaps as early as January 12 (pp. 82, 86), but as Mr. Oaksmith says, "There were piles of it around the building (January 25, 1912) at that time" (p. 260), *viz.*, granite for the south approaches (pp. 240, 260). The granite setting was a benefit to plaintiff (p. 80).

Granite Delivered Per Setting Plan.—Plaintiff's counsel then drags from Follett an impression approaching an admission that the stone did not come according to the setting plan, *i. e.*, in their order (pp. 39-40). Witness simply acquiesces in counsel's leading questions; but there is not a single designated stone or place or occasion or date when any delay occurred, or that he did not have when he required it (pp. 39-40).

Then compare the cross-examination of this same witness, who concedes that the stones were interchangeable, and were interchanged and exchanged (pp. 85-86), dropped and broken in setting by plaintiff's men (pp. 69, 240-241, 85-86, 273).

Furnishing Derricks.—The next element of complaint by plaintiff are *"two derricks complete and one engine,"* the plaintiff "to pay all costs of operating same when used by him (it)" (p. 21), said derricks to be furnished by defendant (pp. 40-41).

The explanation of this trouble is found in the insistence of plaintiff's vice-president (p. 230) and man in charge (pp. 69-71, 167-168, 230-233), *first,* that stiff legged derricks would not satisfy them,

but they must have guy derricks (pp. 69, 73, 168), even though they had to be rebuilt (pp. 73, 231-233) at some delay (pp. 231, 295, 273), and, *second,* that "two derricks complete and one engine" meant two *guy* derricks complete and *two* engines (pp. 70, 71-73, 87, 233) and though the stiff legged derricks were better and more efficient (pp. 231, 232, 295).

Defendants *not only* furnished "*two derricks complete and one engine,*" but rebuilt them to *guy* derricks (pp. 231-232) solely at the request of plaintiff (p. 232), and though they *rebuilt* them to *stiff* legged derricks for their own work (pp. 295, 231, 232), but they then *erected* the derricks (pp. 232-233, 297-298) complete by September 23, 1911 (pp. 233, 167), and even furnished a second engine to plaintiff (pp. 87-88, 233, 275, 297-298), all to get plaintiff to begin setting its granite and to proceed with its work (pp., *supra*).

Follett's statement that he did not get his derricks until the end of December, 1911 (p. 40), is the same kind of a falsehood that characterized pretty much all his testimony (pp. 38-45), and he later admitted that the truth was that he did not get "his two derricks and *two engines*" until end of December, 1911 (p. 87).

It was no part of defendant's duty to *erect* the derricks or to supply a *second* engine (p. 21). The idea of using *two derricks,* as described by Mr. Follett, one to set granite and the other to place concrete, was a joke and betrayed *the extreme ignorance* of this *self styled* (p. 36) superintendent (pp. 40-41, 84-88, 231, 295).

There was no delay to plaintiff's work on account of the furnishing the "*two* derricks complete and *one* engine"—the witness Follett had to admit it (p. 87).

Another example of where the jury may have got their intimation of delay is found at page 90.

What is such evidence worth, and why was it not stricken out? The remark was not responsive.

Placing steel floor-beams.—The next *intimation of delay was the "setting of steel"* (pp. 41, 45, 73). There is no testimony of delay—nothing specific—nothing even general—only insinuations (pp. 40-42, 45).

His cross-examination should be compared with his direct testimony (pp. 82-83).

The reason why the steel was not set is very clear. Mr. Follett and Guerini had built fourteen piers (pp. 73-74, 76-77, 172) in the basement, upon which this steel rested (p. 246), and had neglected to put the reinforcing rods in them (pp. 73-74) that the contract and specifications and plans required and showed (pp. 73, 244-245), and when it was discovered plaintiff refused to tear them down and rebuild them as required by the architect's representative and the defendant, thus delaying the work during the refusal and altercation (pp. 244-245), and also for a period of thirty days required to do the work (pp. 245-246). This situation was discovered, and the architect's order given February 7, 1912 (p. 245), and the first floor steel had all been placed before that and had to all be taken down again and afterwards reset by defendant (p. 246). This testimony is nowhere denied; and it proves conclusively that all of the first floor steel was set far in advance of the granite setting, which was finished February 12, 1912 (pp. 39, 40, 67-68, 86), and that steel was set on fourteen piers (p. 172) and the side walls for the outer ends of the beams, which had not been concreted February 6, 1912, for if it had been done the steel

could not have been removed and replaced as it was (p. 246). The steel had been placed long before, and the reason why it was not in place in late February or early March was that it had to be taken down owing to plaintiff's omission of the steel rods in the piers; except a small space around the derricks, the erection of which would have prevented their use (p. 90).

Mr. Converse says that the defendant was setting steel in March, 1911, and certainly not later than May, 1911 (p. 142), for he acted as its superintendent on the job. He says he "don't know when they started to set steel" (p. 163).

Delivery of Reinforcement Rods.—The next complaint by plaintiff was as to the delivery of reinforcement rods. This is by letter of February 26, 1912, and says, "On February 21st we had not received same," when all the reinforcement had been on the job since November 3, 1911 (see Exhibits Y and Z, pp. 446-477, and testimony, pp. 246, 298). This is like the other complaints, and there is about as much ground for them. Nothing more was heard from Mr. E. P. Bliss (pp. 446, 171).

Some effort was made by the witness Follett to intimate that the arrival on shipboard did not mean that the materials were available at the site (p. 69). He does not say so, any more than he does anything else, but intimates or insinuates as much as if a steamship or a schooner even, could be held in port for a few tons of steel or a few hundred blocks of granite.

The testimony, however, shows that the materials were always unloaded within forty-eight hours (p. 246) and forthwith taken to the site of the building (p. 247).

That ends all the testimony adduced at the trial of delays by defendant, by the witness Follett.

Converse on Delays.—Mr. Converse was at Porto Rico from February 23rd to March 28th (pp. 93-94), and he says he saw the conditions at the building site, saw the work from day to day for five weeks (p. 94), although he made extended visits to the interior of the island (p. 142). He says "we could not" do any work on our contract *until the foundations were completed* (p. 94), which was untrue, for he could start his work the moment any part of the foundations were in. Then he seeks to create an atmosphere of delay without any proof of any delay (p. 94).

This was about March 28, 1911 (p. 93).

The next intimation of delays is in a conversation about May 10, 1912, with plaintiff's officers (p. 106).

The next is embodied in a conversation of February 2, 1912, at New York (p. 127).

This testimony was not of facts. The witness had not been to Porto Rico since May, 1911 (p. 112), and had no knowledge whatever of what he said at that conversation (pp. 112, 114, 142, 146, 162, 165, 167-168).

The next is the following:

> "Q. And you were trying to get the defendants to fix the time when it was to begin to run? A. No, sir; I was trying to fix the responsibility for the delay up to that time" (p. 161).

The next is the following:

> "Q. Except the time of completion? A. Except the time of completion; we were delayed in our work" (p. 174).

The next about progress is the time within which plaintiff's officer, Converse, thought he could complete the work (pp. 180-181).

That is all of Mr. Converse's testimony about delay to, or progress of, the work. Not being at the work, he could not testify as to delays. Yet read his letters, which were read to the jury to the prejudice of the defendant (see *post,*).

Correspondence on Delays, Excluded.—The first suggestion of delay in the correspondence is dated October 21, 1911 (p. 387), and this is a self-serving declaration, without any proof of the truth of the statements made. Motion was made to exclude the self-serving declarations, which was *denied* and *exception* taken (pp. 94-95).

It says:

> "Under date of October 13th, we are advised by our San Juan office that they have not been able to commence work up to that date on our concrete work, as the job was not ready for it. They also state that they started to set granite in the southwest corner, but on account of some question as to measurements, were unable to proceed with the work. They then started to set granite on the southeast corner on the morning of October 13th, and found that there was some question for Mr. Stierle and Oaksmith to settle at this point.
>
> "You will note, therefore, that up to October 13th, they have been unable to proceed with our work, owing to the fact that it is not ready for us. As we have a time contract with you, it is very important that the building should be turned over to us in

such quantities as to enable us to proceed with the work continuously and at such rate as will insure our completion within the terms of the contract" (pp. 387-388).

This letter is written from Boston on advices from San Juan, and mere *hearsay* on the face of it. The writer knew nothing of the facts stated. It should have been excluded. It is a mere conclusion of the witness and no evidence of the facts it attempts to recite.

It should be compared with Exhibit 8, of September 27, 1911, put in evidence by plaintiff (pp. 94, 387), and with Exhibit 26, of September 15, 1911, likewise put in evidence by plaintiff (pp. 177, 401); also see Exhibit J, of September 16, 1911 (p. 435). These exhibits contradict and refute the plaintiff's declarations of delay up to September 27, 1911, and destroy the self-serving declarations of Exhibit 9, October 21, 1911.

All other parts of communications from plaintiff to defendant, containing statements of delay or progress of work, were expunged from the letters or exhibits, because there was no proof of the facts stated therein, no foundation for their admission, and they were all written from Boston by persons who had no knowledge of the situation or of any delays; these are:

1911	Dec.	13	Exh.	30, p. 404,	limited.
	"	18	"	31, p. 404,	"
1912	Jan.	27	"	27, p. 402,	"
	Mar.	9	"	18, p. 393,	"
	"	29	"	23, p. 397,	"
	Apr.	25	"	24, p. 399,	"
	May	22	"	25, p. 400,	"

Now, outside of these self-serving declarations (of the truth of which there is not a particle of evidence), and which the Court in every instance excluded from the evidence and directed the jury to ignore, there is not a particle of evidence in the exhibits of any delay in this case chargeable to defendant.

The record shows that on March 7, 1912, Mr. Berryman, the architect's representative, advised Follett "to put in no more floor" (pp. 250, 41; Exhibits 2 and 3, pp. 383-385). This was on March 7th, that Mr. Follett told defendant's superintendent that the work was to be stopped (p. 250). The conversation and the *exact date* are fixed by the superintendent's daily report of that day (pp. 250-251). Defendant had no authority in the matter (p. 412).

The specific date, the persons and the place, and the present recording of them, all should be compared with the general allegation of the witness Follett under the leading of his attorney, and when defendant's counsel was making no objections, but on the contrary, trying the case with wide open doors (pp. 36-45).

And compare the letters introduced in evidence (pp. 128-129), and compare the witness Follett's testimony of March 9, 1912, with the statement in the letter, and his request for "written instructions" (pp. 42, 384). The Court should note carefully the reply of the defendant, viz.:

> "We would, in reply, respectfully refer you to your contract with us" (p. 385).

On cross-examination Mr. Follett rehearses about the same matter, evidently relying upon his letter of March 9, 1912, to refresh his recollection and to testify from (p. 75).

Not being satisfied with defendant's reply by letter, "We would respectfully * * * refer you to your contract with us" (p. 385), Follett sought further advice or instructions from Superintendent Oaksmith (pp. 250, 439).

Now, in all the testimony there is nowhere any direction to stop the work or to delay the work; and the defendant had no directions to stop the work until April 1, 1912.

It does appear from the testimony that the architect's superintendent told Follett "to put in no more floor" (p. 250), and that the defendant's superintendent told him "the wishes and desires of the supervising architect must be respected" (p. 250), and referred him "to your contract with us" (p. 385).

Contract on Delays.—Now, what does *the contract say?* It says first, the work shall be done

> *"under the direction* and to the satisfaction of * * * the *Architect or his representative"* (p. 12);

then that the

> "subcontractor (plaintiff) * * * shall do the several parts thereof (of the work) *at such times* and *in such order* as the * * * *Architect may direct"* (p. 15);

then

> "Should the subcontractor (plaintiff) be *obstructed or delayed* in the prosecution or completion of the work *by neglect, delay or default* of the Owner (U. S.), the Architect, * * * or *by alteration which may be required in the work* * * * then the time * * * shall

be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid," etc. (p. 15);

then

"*Should the* proper, workmanlike and accurate *performance of any work* under this contract depend in any way upon the * * * work by another contractor (as defendant), on said building, the subcontractor (plaintiff) agrees to use all means necessary to discover any defects in such contractor's work, and to report the same in writing to 'defendant' before proceeding with his work, which is so dependent, and shall allow the 'defendant' a reasonable time in which to remedy such defects," etc. (p. 17);

and then finally,

"11th. The general Contractor(s) will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the subcontractor, agree(s) that they will reimburse the subcontractor for such loss" (p. 17).

Intent of Parties Shown by Conduct.—Now, here *is the law governing* the situation that arose March 7 to April 1, 1912; viz., *the law of the parties and of the case—the contract.*

Defendant writes to plaintiff, March 11th:

"It is evident from your communication that you wish us to direct you what to do in the matter. We would, in reply, respectfully refer you to your contract" (p. 385),

and on March 13th the defendant's superintendent tells the plaintiff's agent, *"the wishes and desires of the Supervising Architect must be respected"* (p. 250), and *that's all.*

Nowhere are there any instructions, orders or directions by defendant to plaintiff except what are contained in the contract, *as to stopping of the work*, showing that defendant intended and gave notice to plaintiff that it (defendant) intended to stand squarely and strictly on the contract. And that plaintiff intended and expected to do likewise is shown equally conclusively by its correspondence (Exhibit 2, pp. 383-384 and Exhibit 23, pp. 397-398), and testimony (pp. 81-82).

In these letters plaintiff set forth explicitly what its *losses* will be, and reminded the defendant as follows:

> "We make you aware of our position in this *matter, as you are responsible for our expenses due to delay caused to us by the suspension of work,"* etc. (p. 384),

and in his testimony Mr. Follett says:

> "When the delay ceased we expected to do more work and we sent our men (employees) to New York and Boston to keep down expenses, and we charged those losses and expenses to Carlin and expected to be reimbursed for them" (pp. 81-82).

That the understanding was mutual is shown by defendant's acts and declarations as well (pp. 385, 439, 81-82, 251-252, 262, 296). Plaintiff's superintendent says so in so many words (pp. 81-82).

The work required to be done by defendant to the foundations was not to replace any "labor and

materials not included" in plaintiff's contract, nor any "labor and materials" supplied by defendant (p. 16), but *the work done was an "alteration* which may be required in the work" (p. 15), and which was required by the architect and his representative (pp. 247, 248-249, 252), to strengthen the foundations by underpinning them (p. 321), and for which defendant was paid (pp. 295-296, 321), as for *a change of plan, an alteration* (pp. 248-249, 252).

The situation was completely covered by the contract, and both parties acted strictly under the contract, except that the plaintiff *persisted in refusing to carry out the directions* of the architect and the defendant as it had covenanted it would do (pp. 12, 15, 17).

The plaintiff was not delayed in March, April and May, 1912, but had specific written instructions to proceed with the work.

Defendant Ordered Plaintiff to Proceed with Work.—As early as February 3, 1912, the architect's representative and the defendant

> "requested that the forms for the artificial stone be gotten out at once, in order that there may be no delay" (p. 456).

Not a thing was done, excuses were made (p. 445). Long before November 14, 1911, the plaintiff was written:

> "We sincerely trust that you have taken advantage of the opportunity to cast and mould much of your stone for the superstructure" (p. 450).

The plaintiff never cast a stone for the superstructure (pp. 77-79, 162, 178, 342), not a thing above the first floor (pp. 146-147, 162, 342). The plaintiff never secured the acceptance of its samples of artificial stone so *it could proceed* with the work (pp. 78-79). Yet plaintiff says the work ("putting in the floors") was stopped by the defendant.

Plaintiff had summary orders on April 3, 1912, to proceed with its work on April 17, 1912 (p. 439), on the entire south and east walls, and is directed:

> "As you have much exterior form work to prepare, in advance of pouring the concrete, it certainly seems that this should be done now" (p. 439).

Instead of proceeding with the work *as directed*, the plaintiff sent his men to the States on the same day (pp. 81, 84, 251-252, 296).

There is nothing in the case to contradict the evidence set forth. It stands unchallenged and undisputed. The plaintiff had no intention of doing its work, having made a bad connection (*infra*, pp.), and the contract price being too low (*infra*, pp.).

There is not a particle of evidence in the case that the defendant or its agents delayed or stopped plaintiff's work at any time or for any period.

Defendant challenges plaintiff to set forth in its brief any evidence, oral or written, of delay by defendant.

The verdict of the jury in this case is an ominous illustration of the results of the Trial Court ad-

mitting *or permitting to be read to the jury* incompetent and immaterial evidence under instructions to the jury to ignore it. The jury did not ignore it, but built upon it an aggravated case of delay which they may have thought warranted the plaintiff in rescinding and terminating its contract, contrary to the instructions of the Court during the trial (pp. 99, 104-105, 107).

POINT II.

The evidence shows that the work undertaken by plaintiff in its contract was greatly delayed by the ignorance and neglect of plaintiff's officers, agents and employees, and by mismanagement of, and controversy between, its officers and agent.

(REFERENCES ARE TO MARGINAL PAGES.)

Plaintiff at Fault.—The plaintiff was responsible for the delays to its work. The plaintiff was responsible for delays prior to March 9, 1912 (pp. 65-68). Plaintiff's vice-president, artist and modeller (all in one), Mr. Guerini (pp. 62, 66, 92, 257, 274), was at the site of the work from early January, 1911 (pp. 65, 93), until the middle of August or the middle of September (pp. 67, 162), getting ready to do something (pp. 66, 257-258), but without casting a single stone (pp. 77, 162, 90) or doing any work whatever upon or in direct connection with the building (pp. 67, 77, 90, 257).

Mr. Guerini was attended by *one or two* men (pp. 37, 93, 257), and he was followed on February 18-23 by President Converse and "Man-in-Charge" Follett (pp. 66, 93). Mr. Converse says he was at

Porto Rico *five weeks* (p. 94); that he saw the work from day to day and the progress made (pp. 38-39, 64-65, 68, 94), as did Vice-President Guerini and Mr. Follett (pp. 37, 64-65). The condition and circumstances were well known to them, and they were perfectly apparent (pp. 37, 64-65, 68, 94, 162), and the plaintiff's officers all knew in February, 1911, that nothing could be done on their contract until some part of the foundations were completed. They so stated (pp. 37, 64-65, 94), and the contract so provided (p. 15, Clause 6th). The foundations were completed about October 1, 1911 (pp. 89-91).

With this knowledge and without any pledges or promises on the part of the defendant (pp. 94, 68, 162), as to the work, and with a contract clause specifically delaying the commencement of his work "until the building is ready to receive his work and after he (plaintiff) has been notified to proceed by the" defendant (p. 15), the plaintiff elected to have its president remain in Porto Rico *five weeks* (pp. 94, 114), its vice-president and "Man-in-Charge" and *one or two* attendants to remain permanently (pp. 64, 67, 257).

The testimony shows that Mr. Guerini came to Porto Rico, not on account of the Federal building and Post Office alone (p. 279), but to establish himself at San Juan as an artificial stone artist and contractor (pp. 279, 65-66), and that was what he did (pp. 131-132, 257), and that from February, 1911, to February, 1912, he did custom work in and about San Juan, that had no connection with the contract between the parties (pp. 131-132, 257). The plaintiff admits it, and that the "Man-in-Charge" Follett likewise was attending to other matters (pp. 64, 132).

Mr. Follett says Guerini made models which were not necessary to the work and more than was required (pp. 66, 38). No molds or models were required to set the granite or to back it up with concrete (p. 66), and that was the first work required on the job (pp. 39, 45). It was the end of September before they were ready to start, or even had their wood-working machinery installed (pp. 77, 162, 180, 80).

The option was not exercised that plaintiff should *set* the granite until September 15, 1911 (pp. 38, 67, 162), and no granite was set until October 13-15 (pp. 67, 38, 89, 91, 233, 234, 445), and no artificial stone had been cast at that time by plaintiff (pp. 77, 146-147, 162).

The stone-setting was undertaken by Mr. Guerini and his *one or two men* (pp. 67, 165), who were not stone masons or stone-setters (pp. 257-258, 240-242, 235, 233-234, 230, 67, 69, 231), and after blundering along with the work for five weeks (pp. *supra*, and pp. 74, 229-238, 240-242), under the repeated protests and complaints of defendants (pp. 449-451, 453), some real stone masons or granite setters, familiar with American tools, derricks and contrivances, were sent down from the States by President Converse (pp. 73, 163, 443). They arrived about November 22, 1911 (Exhibit U), and the *interior granite*, exclusive of the outside approaches, steps and coping for exterior walls, was set January 12, 1912 (pp. 260-261), or February 12, 1912 (p. 39).

In October, 1911, when plaintiff had a chance to do something and to make a showing (pp. 41, 83, 233-234), the man-in-charge was on a prenuptial trip to the central part of the island ten days or more (pp. 64, 229-230, 234, 236-237, 239-240). From

February 18, 1911, to the end of September, 1911, not a thing was done by Follett, Guerini or Guerini's two men on this Federal building or in performance of the contract between the parties (pp. 63, 77, 66) for which any recovery could be claimed.

From August 26, 1911 (pp. 230-231), to September 23, 1911 (p. 233), was occupied in making over and rigging anew the two stiff-legged derricks that the defendant had provided for the work (pp. 294-295, 167-168, 69-70), and which were altered at great expense of time, labor and new materials (pp. 231-232, 168, 295), at the special request and insistence of plaintiff acting by and through Vice-President Guerini (pp. 167-168, 230), and "Man-in-Charge Follett (pp. 168, 70). The stiff-legged derricks were preferable, better and more economical (pp. 231, 232, 295), but to meet the wishes of plaintiff, defendant rebuilt the derricks (pp. 232, 230, 167-168).

Plaintiff says they began setting stone "as soon as we were able" after September 15, 1911 (pp. 162, 233), which was October 13-15, 1911 (pp. 38, 67-68, 233-234), and there is not a suggestion in the correspondence that there was anything to delay the granite setting until after September 15, 1911, either for want of granite or for want of derricks (pp. 67-68, 444).

The Trial Court instructed the jury that any delay prior to the plaintiff's undertaking to set the granite was waived (pp. 376-377). The plaintiff was setting granite from October 16, 1911, to February 12, 1912 (p. 39), or January 12, 1912 (pp. 82-83). There was no delay by defendant to the setting the granite for the building. The deliveries are shown absolutely by Superintendent Oaksmith (pp. 229, 233, 240, 260) and were not dis-

puted (p. 260). Between October 16 and December 1, 1911, only 1500 cubic feet of granite had been set in the building (p. 239).

They made and placed 573 cubic yards of concrete between October 16, 1911, and March 9, 1912 (p. 194), which should have cost $8,024 (pp. 110-111). No concrete was placed or could be placed prior to October 16, 1911 (pp. 38, 80), and from October 16 to March 9, 1912, the plaintiff had the free, unobstructed and entire use of the site and surroundings of the Federal Building (pp. 41-42, 82-83, 90, 233, 239, 260).

As Mr. Follett, the plaintiff's man in charge, says:

> "Well, in February, we had been carrying along our concrete work at that time. We continued on our concrete work at that time * * * placing the basement interior walls and we were able very shortly after that time to start our floor slab on the first floor after some steel had been placed" (pp. 374, 82, 90).
>
> "At that particular time we were getting along pretty well" (p. 83).
>
> "Q. How long did you continue with your concrete work? A. That continued satisfactorily along until the 9th of March, 1912" (p. 42).

From September 15, 1911, to February 12, 1912 (pp. 39-40, 67-68, 86, 193, 395), or January 12, 1912 (pp. 82, 190, 261), plaintiff placed 573 cubic yards of concrete in walls and piers and first floor of building (pp. 193-194, 204-207), set 3,460 square

feet of granite (pp. 164-165, 193, 292, 395) *in the building proper* (pp. 260-261, 287).

It took the plaintiff five (5) months, 150 days, to do 573 cubic yards of concrete (pp. 191, 193-194, 204-207) where the plaintiff had free and unobstructed use of the site and entire work (pp. 41, 83, 233), and this 573 cubic yards was the easiest and cheapest part of the work (pp. 304-305, 323-324, 333, 34), and was only 9 per cent. in value of all the concrete to be placed by plaintiff (pp. 164-165, 191-192, 193-194, 204, 207, 110, 151, 304-305, 323-326).

Of course plaintiff laid 3,460 square feet or 5,190 cubic feet (p. 288) of granite during that period, but by its own election and for profit (pp. 80-81, 164, 182, 437), but no concrete could be set until the granite was set for the building (p. 45).

This amount of work done in 150 days should be compared with the estimate of 200 days to do the entire contract by plaintiff's president, Converse, and by his man-in-charge, Follett (pp. 44, 175, 180-181). It shows that they had not any conception of the work they were undertaking, how little they could depend on the native labor and what ignorance the man-in-charge displayed (pp. 68, 229-230, 234), although they knew and saw all the conditions at the site of the building (pp. 68, 162).

An attempt was made by Follett to show that the granite did not arrive or come along as fast as plaintiff required it (pp. 39-40), but it was shown conclusively that he did not know what he was talking about and he admitted it (pp. 68, 91), and then it was shown conclusively when the stone did arrive (pp. 240, 229-230, 233, 260-261, 287), and by photographs that it was there (pp. 258-259).

Then Follett sought to make out that the stone did not come in the order or sequence of their set-

ting (pp. 39-40), and this was met by his admitting that the arch stones and the course stones were interchangeable and that they were actually interchanged (pp. 85-86).

Failing in these two claims that defendant delayed the work, he then tries to make out that the derricks were not complete or not right, and that he had only *one* when he should have had two (pp. 39-40, 87), which meant they had two derricks erected in place by defendant, but he had only one engine (pp. 40, 71-72, 87-88), he claiming that two derricks complete and *one engine* (pp. 71-72, 87-88, 213) meant two derricks and *two engines* (pp. 70-72, 87-88, 233).

The derricks were erected complete by defendants, Sepetmber 23, 1911 (pp. 87-88, 231-232, 273, 232-233), though the erection was no part of defendant's contract, undertaking, or duty to plaintiff (pp. 21, 232).

Seeing the folly of this claim, he then tried to make out that the derricks were in the way (p. 82), and then he was forced to admit they were the derricks he had used (p. 90) and that they occupied a circular space in the center of the building and were necessary to place the steel for his concrete (pp. 82, 90) as is always the case in building construction (p. 326).

Later the plaintiff claimed that the reinforcement steel had not been delivered in time (pp. 443, 447), and this was positively disproven (pp. 246-247, 298, 447).

The amount of it was, Follett was trying to excuse his own neglect of the work and the effect of his quarrels and disputes with Guerini (pp. 76, 89, 237, 241-242), and his incapacity to handle the work (pp. 237, 242).

He refused to remember, in the presence of his uncle and employer, any of the numerous things that happened on the work (pp. 65-66, 68-71, 84-85, 88), and that were the subject of the defendant's daily reports (pp. 239, 241, 251), and in part of the correspondence between the parties (pp. 401, 405-406, 437-438, 441-446, 451).

Specific Delays by Plaintiff.

Delays Enumerated.—Some delays to the work by plaintiff are as follows:

(1) February to September 15, 1911, Guerini, Follett and *two* men hanging around (pp. 37, 65-66, 93, 62) San Juan and other places (pp. 64, 132, 141-142, 257), getting ready to mould concrete and making thirty moulds about 1x1x3 feet (pp. 66, 77, 257), but casting no concrete whatever (pp. 77, 146-147, 162, 178, 257), nor did they even get out samples acceptable to the Government (pp. 77-79, 143, 171, 178, 285-286, 316-317, 319, 415, 417), nor did they get the method of jointing accepted by the architect or his representative (pp. 65, 142-143, 285, 319, 448-449), although they well knew it all had to be done to the satisfaction and acceptance of the architect (pp. 12-13, 140-141, 174, 178, 319), although it was calculated and contemplated from the first that that would be the first work done (pp. 37-38, 62, 66, 277-280, 169), and no work of casting concrete forms could be undertaken until said samples were accepted (pp. 417-418).

(2) August 26 or 23 to September 23, 1911, by insisting upon and requiring defendant to furnish "guy" derricks in lieu of "stiff legged" derricks,

which had been supplied by the defendant (pp. 69-70, 167-168, 230-231, 233), and which had to be rebuilt at great expense of time, labor and materials (pp. 168, 231-232, 295), at the special request and insistence of plaintiff's local representatives (pp. 167-168, 232, 203-204, 70), although the stiff legged derricks were better and more economical (pp. 231-232, 295). This caused a further delay.

(3) September 23 to October 16, plaintiff spent getting ready to set granite. This delay was chargeable wholly to plaintiff (pp. 162, 233), as it had the entire site of the building to itself. Granite was at the site (pp. 233, 240, 247), notwithstanding Mr. Follett's denial (pp. 38-39), and his subsequent admissions, *he did not know* (pp. 68-69). All the granite for the building proper, exclusive of exterior steps and approaches, was at the building prior to December 12, 1911 (pp. 240, 247); the plaintiff never *set* any of the granite exterior to the building proper, they were relieved of it by mutual agreement (pp. 39, 68, 127).

Some other things were the following, which caused delay and which were wholly chargeable to the plaintiff:

(4) Failure to employ sufficient and competent men (pp. 37, 67, 257, 234).

(5) Negligently setting granite stones too low (pp. 67-68, 233-234, 235, 445).

(6) Negligently dropping cut stone on courses already set in place (pp. 69, 240-241, 246, 258, 272).

(7) Ignorantly requiring *stiff legged* derricks to be reconstructed and rebuilt into *guy derricks* (pp. 69-71, 73).

(8) Guerini selecting his own derrick engineer (p. 234).

(9) Negligently burning-out and destroying an electric motor for turning concrete mixer (pp. 71, 90, 234, 241, 259-260, 272-273).

(10) Negligently building fourteen piers without reinforcement (pp. 74, 261-262), when reinforcement was required by the specifications and plans (pp. 74, 172, 243-246, 245-246), which had to be rebuilt (pp. 74, 76-77, 243-246).

(11) Deliberately refusing to follow directions of defendant (pp. 74-75, 387, 453).

(12) Failure to keep an adequate supply of crushed stone on the job (pp. 234-235).

(13) Negligently piling plaintiff's stone on a water main, causing it to break, flooding the work and depriving the job of water for mortar and concrete (pp. 235-236).

(14) Permitting plaintiff's men-in-charge of the work to be absent from the job (pp. 64, 131, 132, 142, 239, 241, 257), as shown by the ignorance or untruthfulness of Follett (pp. 65-66, 68-71, 84-85, 88).

(15) Delays caused by ignorance and contentions as to repairs (pp. 241-242).

(16) Delay in giving notice to defendant that a *guy derrick* would absolutely be required instead of the *stiff legged* derricks that had been provided, until August 26, 1911 (pp. 230-233, 273, 277, 298, 435, 444), although the derricks had been in Porto Rico since July 15, 1911 (pp. 294-295).

(17) Delay in securing and employing an independent hoisting engineer (pp. 63, 234).

(18) Delay in securing a second hoising engine for the second derrick (p. 298).

(19) Delay in assembling and setting up concrete mixer (December, 1911) (pp. 77, 89, 272-273).

(20) Delay in casting any decorative concrete whatever (pp. 77-79); none ever cast by plaintiff (pp. 79, 319, 445, 450, 456).

(21) Delay and neglect in securing the approval of the Government's supervising architect of the artificial face stone samples and jointing (pp. 78-79, 285-286, 319, 320, 448-449, 456), as required by the contract (pp. 12-13, 14, 417, 285-286), and by notice from defendant (p. 406).

(22) Delay in effort to get artificial granite substituted for natural granite at request of Mr. Guerini (pp. 281, 317).

(23) Delay caused by misinterpretation of Government drawing by plaintiff and defendant (pp. 283, 285, 312-313) until February 28, 1911 (p. 314).

(24) Delay in making and securing the approval of shop drawings, showing jointing, etc. (pp. 64-65, 316-317, 319).

(25) Delay in *getting rid* of either Guerini or Follett, after there were serious differences (pp. 63, 76, 81, 89, 239-240, 241, 274, 313-314, 441, 451-452, 454).

(26) Delay in securing a competent superintendent (December 18, 1911) (pp. 76, 239-240, 403, 404-405, 451, 455).

(27) Delay in securing or employing competent stone setters (pp. 443, 449, 451, 452, 453) and carpenters (pp. 239, 443, 452, 453).

(28) Delay in correcting irritation and trouble between Mr. Guerini and the representative of the Government architect, November, 1911, to February, 1912 (pp. 236, 238-239, 451), and correcting labor troubles arising from having *two bosses* or two men-in-charge of the work (pp. 236-238, 241-242, 258).

Neglect of Work, October 16 to February 12, 1912.

Mr. Guerini's Vicious Activities.—December 4, 1911, Guerini was called to Boston by Mr. Converse (p. 454), arriving about December 12 (p. 437), and on December 18 had arrived at Boston and had had a lengthy consultation (pp. 137, 440). He did not return until about January 3, 1912 (pp. 238, 240), but he left again about January 8, 1912, for the States (p. 241), and while in the States visited Washington, D. C. (pp. 135, 136, 137, 236, 238-239, 247, 333). He returned again with a carpenter to San Juan January 25, 1912 (pp. 242, 247, 190), at the same time the new representative of the Government's architect arrived at the building (pp. 242, 247, 319, 330, 333).

Mr. Guerini was on the work January 6, 1912, for he let a stone fall (p. 240). He had returned in early January, about the 3rd (pp. 238-240). He must have gone to the States on January 7 or 11, 1912, to have visited Boston, and returned the 25th, as the passage at sea requires ten days. He went again to the States about February 1, 1912, and returned from Boston about February 17, 1912 (pp. 300, 126), but not in the employ of the plaintiff (pp. 81, 89, 133, 239-240, 241), as he was paid off February 16, 1912 (p. 126), and he did not meet Mr. Converse, who was on his way down to Porto Rico

(pp. 134, 136-137, 142, 125, 112, 134). Mr. Converse cabled him to come to Boston, as he was starting himself to go to Porto Rico (pp. 136-137), and this was "to get rid of him" (p. 136), and it was in the latter part of February (p. 136).

As Mr. Converse stated it, on December 6, 1911,

> "he (Guerini) certainly has lost his usefulness on this job, and, so far as we are concerned, on any other job" (p. 441).
>
> "He couldn't handle any work for us alone, we wouldn't have him" (p. 166).

Subsequently, soon after, Guerini returned to Porto Rico, but without Mr. Follett's knowledge, not in the employ of plaintiff and without wages (p. 89).

Guerini made three (3) trips to the States between December 4 and February 17, and was away from the job sixty days in a total of seventy-five days between December 4, 1911, and February 17, 1912. Yet all his time at $12 per day and transportation is included in the verdict of the jury and the judgment of the Court below, amounting to upward of $1,200.

December 18, 1911, Mr. Lootz, a civil engineer, was sent from Boston to Porto Rico (pp. 239, 405, 447), and a Mr. Russell, both competent men (p. 239), were sent to Porto Rico; then things began to move (pp. 239, 402, 403), but Mr. Lootz was ill (pp. 239-240), and returned to the States in about ten days (pp. 75-76, 170-171, 402, 403), when Mr. Guerini returned to Porto Rico from the States (p. 240).

February 3, 1912, the defendant writes the plaintiff that the architect's representative,

> "Mr. Berryman, has requested that *the* forms for the *artificial stone work* be gotten out at

once, in order there may be no more delay" (Exhibit LL, p. 456).

The answer of plaintiff is to the effect that *the forms are to be built* in place and little

"can be gotten ready ahead of time" (Exhibit X, p. 445).

Is it any wonder that the work was expensive? What kind of management was that?

POINT III.

The rescission, abrogation or termination of the contract by the plaintiff was not justified and was a breach of its contract with the defendant.

(REFERENCES ARE TO MARGINAL PAGES.)

It has been shown that up to late February and to March 9, 1912, the delays were wholly due to the plaintiff's neglect, omissions and delays and no ways chargeable to defendant (see pp. 106-118); that all delays up to August 17, 1911 (proposal to do steel work, pp. 73-77, 161-162, 435-436), and to September 15, 1911 (exercise of option to do granite setting, pp. 67, 68, 401-402), were waived, and the Trial Court so charged the jury (pp. 355, 360, 377). It is further shown that after September 15, 1911, to March 9, 1912, the plaintiff had full sway and full possession of the Federal Building and its site until the basement was complete, so that the first floor steel could be set (pp. 41, 42, 82, 83, 90, 233, 239, 260), and that on March 9, 1912, steel was set for several days' work (pp.

82-83, 90). The steel was set (p. 246) as early as February 7, 1912 (p. 245), when the Government's representative ordered the fourteen piers to be taken down (pp. 243-246, 172) and properly rebuilt with re-enforcing bars (pp. 243-246). No work was done on the building after March 9, 1912 (p. 81).

Anything that justified a rescission, abrogation or termination of the contract therefore must have occurred between March 9 and May 22, 1912. Now, nothing occurred but two things, viz.:

(a) The alleged failure by defendant to make progress payments to plaintiff; and

(b) The stoppage of the work by the Government pending an investigation on March 13, 1912 (pp. 250-251).

These two matters will be treated independently.

POINT IIIa.

There was no default on the part of defendant in making monthly or progress payments.

The failure of the defendant to pay monthly or progress payments in full, or to make the last monthly payment, is not a sufficient cause for the plaintiff to terminate the contract.

(a) Alleged failure to make monthly or progress payments.

Requisition for Payments.—One of the grounds or reasons for the termination or rescission of plaintiff's contract attempted on May 22, 1912 (Exhibit 25, pp. 400-401), was the alleged failure on

the part of the defendant *to make payments in accordance with the terms of the contract* (pp. 10, 401). The first suggestion of payment on the part of the plaintiff to defendant was on December 19, 1911, when plaintiff requested defendant to send *form blanks for application* for payments (Exhibit 10, p. 388). These were required to be used by plaintiff by the terms of its contract (p. 18), and they were sent the next day, December 20 (Exhibit 11, p. 388), and were in the form shown in Exhibit 12 (p. 389).

Not until December 30, 1911, did the plaintiff make any application for payment on account of its work, and then without any statement of the quantities of concrete claimed to have been placed (Exhibit 14, pp. 390, 454). No quantities being stated, defendant requested estimate of quantities upon which the application was based (Exhibit JJ, pp. 454, 157).

Per the contract, this requisition or application could not be expected to be paid until twelve days after it was received by the defendant, and as it was made by Mr. Follett, agent at San Juan, it could not have been received in New York before January 6, 1912, and payment therefor could not have been expected before January 18, 1912. The correspondence and testimony show that *at this time grave differences had arisen* between the president and vice-president of the plaintiff (pp. 89, 135-136, 166, 440, 441, 451, 454-455), and the defendant, it would seem, was justified in making inquiry and in asking that Mr. Converse, when he came for his money, should "bring the necessary corporation authorization to receive the same" (Exhibit 15, p. 391), which was furnished and mailed to defendant January 30, 1912 (Exhibit 16, p. 392), which authorization was signed by H. P. Converse, as

president, without any resolution of the board of directors or any act whatever on the part of the company, nor was it, it seems, accompanied by any by-law authorizing the acceptance and use of said moneys by Mr. Converse, nor what, if any, interest or authority Mr. Guerini had in the matter. On this letter of authorization there was a note or postscript as follows:

> "Mr. Converse will call at your office Thursday morning, February 1, and will be in New York for the day only."

It seems that Mr. Converse did not call until February 2, when he received and accepted a check for $3,765.50 (pp. 96, 107, 289, 393, 395), which was upon the statement of quantities received by defendant from the work at Porto Rico at the unit price of $10 per cubic yard, to wit:

343 cubic yards concrete at $10.....	$3,430.00
2,500 square feet granite at $.40.....	1,000.00
	$4,430.00
Less 15 per cent., per contract.....	664.50
	$3,765.50

(p. 289). There is nothing in the testimony or correspondence complaining about these quantities or contradicting them in amount. Plaintiff's application had been for $5,654, which, less 15 per cent., leaves $4,795.90. There is nothing to show that upon the receipt and acceptance of this money, the first payment, any complaint was made or any dispute had. Mr. Converse said he was dissatisfied (p. 96).

At the time this payment was made, however, the plaintiff owed the defendant for wages of hoisting engineer, oil and other supplies $541 (pp. 233, 275, 21, 444), on account of which no deduction was made from the estimate of $3,765.50. In addition to this amount, the plaintiff, in the performance of its work, had built several concrete piers in the basement of the Federal Building without installing the reinforcement rods required by the specifications, and these several piers had been ordered to be taken down and rebuilt by the Government's representative, and at this time, viz., February 6, 1912 (pp. 245, 244-245), this issue was between the parties as to who should pay for the tearing down and rebuilding of these several piers, for which work the plaintiff charged defendant $300 (pp. 262, 394). Defendant took down the steel which had been placed and had to be removed (p. 246).

The specifications and contract required the plaintiff to smooth or finish its concrete on piers and walls, so that the same could be painted or decorated as might be required (pp. 421, 424). This work likewise had not been done (pp. 334, 443). While the granite work had been set in place, it had not been cleaned down and pointed, which is a part of the work of setting (pp. 334, 427). None of the work had been done to the satisfaction of the general contractor, the defendant (pp. 294, 140-141), nor had the satisfaction of the architect been secured (pp. 174, 178) but, on the contrary, the architect's representative, Mr. Stierle, had had much trouble and many differences with Mr. Guerini, who was directing the work at San Juan (pp. 236, 238-239, 242, 247, 297, 441). No satisfaction is pleaded (pp. 7-11) or waiver of the condition precedent requiring it. That the quan-

tities were correct is shown by the testimony of Follett, brought out by the defendant in cross-examination, who stated them as concrete, 340 or 350 cubic yards, and granite set, 2,500 square feet, making about $3,000 (p. 86); and on later cross-examination he testified that at the end of February, 1912, he measured the work and made 573 cubic yards of concrete and 3,460 square feet of granite, so that by the plaintiff's own measurements the quantities set forth in the estimate, by which plaintiff was paid on February 2, were correct (pp. 165, 193, 194, 395).

There is no unit price or rate fixed in the contract by which monthly payments were to be made (pp. 103, 323, and par. 12, p. 18), but the total number of yards to be placed by the plaintiff, into the total contract price, gave a unit price of $18.50 per cubic yard (p. 153), and deducting 15 per cent. would leave $15.72 as the price which the plaintiff would be entitled to receive if *all of the concrete was of the same character* (pp. 110, 151, 164), which it was not. Mr. Converse, the plaintiff's president, made an estimate in considerable detail and determined the actual (p. 148) as well as the fair and reasonable average value of *all the concrete* that plaintiff was to do at $15.75 per cubic yard (pp. 108-110, 111, 151, 148-151); and he based his claim for prospective profits of $9,738 (p. 111) on the difference between the $18.50 and $15.75 per cubic yard, with some deductions for overhead charges, etc.

After establishing the fact that the fair value of the concrete was $15.75 a cubic yard to warrant his asking the jury to give him $9,738 prospective profits as damages, Converse now wants the Court to hold that he was entitled to $1.07 per cubic foot

or $28.89 per cubic yard (p. 153) in monthly payments from the plaintiff (pp. 153, 156, 157, 393) and to believe that defendant agreed he should have it, although it would give 150 per cent. of his entire final contract price (pp. 152-157, 188-189) and for the cheapest part of the concrete work.

The work done by the plaintiff prior to February 2, 1912, was in the basement walls and first floor and the backing up of the granite which the plaintiff had set (pp. 41, 83, 89, 146-147). This concrete work was of the same character that the defendant had done below the basement floor and for which plaintiff was to receive, per its contract, $6.70 per cubic yard (pp. 20, 291, 293-294, 323-325, 326). This concrete in the basement, walls and between the steel I-beams on the first floor was concrete for which the defendant ultimately received 35 cents per cubic foot, or about $10 per cubic yard (pp. 156-157, 343-344), and it is further shown that at the time this payment was made the plaintiff had notice, or intimation at least, that the price of $1.07 per cubic foot, which it had previously received, was excessive and would be reduced (pp. 156-157, 289-290, 343-344). It is therefore submitted that certainly *up to February 2, 1912, no suggestion was made of a failure on the part of defendant to make payments* in strict accordance with the contract and in accordance with the measurements made by plaintiff's agents, and at a fair and reasonable price for completed work, although the work *was not completed nor finished* in accordance with the terms of the contract and specifications, nor to the satisfaction of either the general contractor or the architect's representative (pp. 334, 140-141, 174, 178, 294).

At this conference of February 2, when the plaintiff received its payment of $3,765.50, the defendant's president admitted to plaintiff's president that defendant had been estimated or paid for the concrete that had been placed by the plaintiff at the rate of $1.07 per cubic foot, and gave to plaintiff's president a schedule of the unit prices which had been estimated to the defendant by the architect's representative on the work (pp. 96-98, 152-157, 289-291; Exhibit 14, pp. 390, 327-329) and the *plaintiff's president testifies* that Mr. J. P. Carlin promised him that the plaintiff should be paid at that price, viz., $1.07 per cubic foot (pp. 96, 152-157), which is flatly denied by Mr. Carlin, defendant's president (pp. 290-292, 327-329). Nowhere in the correspondence is there a suggestion that any such *promise or pledge was made,* or any agreement consummated between plaintiff and defendant or their respective presidents that payments would be made at that rate. On the contrary, under date of February 6, 1912, the plaintiff writes defendant that

> "In accordance with your instruction to Mr. Converse, we have made our January requisition in the units and unit price used by the Government engineer when he makes up monthly estimates, according to your schedule of amounts.
>
> "3. Exterior and interior concrete walls and arches and cement work, $1.07 per cu. ft.
>
> "4. Concrete floors and casting, 45½ per sq. ft." (Exhibit 17, p. 392).

Mr. J. P. Carlin, defendant's president, denies that *he made any promise or pledge* to pay $1.07

per cubic foot for concrete (pp. 290-291, 328), or that he instructed Mr. Converse to make his requisition at such unit price (pp. 290-292, 327-329); and it was shown that if such a price were used against the quantities of concrete to be placed, the plaintiff would receive approximately 150 per cent. of his contract price (pp. 152-153, 291). Plaintiff's contract price was $64,750, there were 3,300 cubic yards of concrete to be placed (pp. 110, 151, 266*b*, 288), which at $1.07 per cubic foot, or $28.90 per cubic yard, would give to plaintiff on progress payments $95,370, nearly 150 per cent., and this when defendant knew that plaintiff *was not finishing its work as it went along,* and when certain parts of the work already built had been condemned and ordered to be taken down and rebuilt (pp. 74, 245-246) and when the plaintiff was greatly behind in its work, having spent twelve months in doing less than one-ninth of its contract price.

The explanation of this $1.07 per cubic yard was demonstrated by the cross-examination of plaintiff's president, when he admits in so many words that Mr. Carlin told him that the $1.07 was the Government's price to him (Carlin), and that he (Converse) went away with the impression that that was what he was to be paid (pp. 155, 151-157). It is perfectly apparent from the testimony that this price of $1.07, and the certainty of Mr. Carlin's assurance to Mr. Converse, grew stronger with time, and at the trial, and that Mr. Converse was not so certain of any pledge, promise or agreement, except so far as his recollection went (pp. 152-153, 155), and that there was every reason for Mr. Converse to recollect that there was an express promise and agreement to pay a definite unit price (fol. 469). He says he had in mind the opinion of the

Supreme Court, that there was nothing in the contract to fix the monthly payments (p. 157).

Requisition of February 6, 1912.—The United Supreme Court, in its opinion, had pointed out that no breach could be prefaced upon the failure to make progress payments, because the contract did not provide the amount or measure of such payments, because no unit price was stated nor any method by which the progress payments could be determined, and Mr. Converse was attempting to supply what was needed to establish his case (p. 157).

The requisition or application was for $9,012.50, as "due us under the contract" (p. 393). No quantities were stated in this application of February 6, 1912 (Exhibit 17, pp. 392-393), but plaintiff's own statement of quantities can be determined from its communication of March 9, 1912 (Exhibit 19, p. 395), wherein it is stated that during the month of February it placed 105 cubic yards, of a total of 573 cubic yards, leaving up to the 1st of February a placing of 468 cubic yards of concrete and 2,600 square feet of granite set. 468 cubic yards are 12,636 cubic feet.

12,636 cubic feet @ $1.07 makes....	$13,520.52
2,600 square feet of granite @ 40 cents makes.....	1,040.00
Or an aggregate of.....	$14,560.52
Deducting 15%, or.....	2,184.08
Leaves.....	$12,376.44
And deducting payment February 2.	3,765.50
Leaves.....	$8,610.94

which should, per plaintiff's letter of February 6, at $1.07 per cubic foot, have been its application. The application, however, was for $9,012.50, the discrepancy not being apparent.

Estimate of February 6, 1912.—The application by plaintiff of February 6 for $9,012.50, without any statement of quantities and at the price of $1.07 per cubic foot for concrete, and the delay and distressing condition of the work, including the several piers of the basement that had been condemned and ordered pulled down and rebuilt (pp. 74, 245-246), the unfinished condition of the work that had been done, both granite setting and concrete (pp. 334, 294), the progress of the work, and the quarreling of plaintiff's president, vice-president and local agent (pp. 76, 441, 451) were sufficient causes for the defendant to withhold payments.

The application should have been as follows:

468 cubic yards of concrete @ $10 gave	$4,680
2,600 square feet of granite @ 40 cents	1,040
A total of	5,720
Less 15%	858
Left a balance of	$4,862

which was the most that the plaintiff could properly and rightfully claim under its contract.

The plaintiff owed to defendant for

Hoisting engineer's wages, oil, etc. (p. 275)	$541.22
Cost of pointing and cleaning 2,600 square feet of granite @ 10 cents	260.00

Finishing concrete surfaces exposed, estimated	250.00
Taking down and rebuilding concrete piers in basement, which had not been done (pp. 245-246, 261-262)	300.00
	$1,351.22

leaving a balance of $3,510.78, on account of which plaintiff had been paid $3,765.50.

In connection with this matter, it has further been shown that neither the granite setting nor the concrete work had been done *to the satisfaction* of the defendant or of the architect (pp. 334, 174, 178), but that, on the contrary, it was shown that the defendant was dissatisfied (p. 294).

It is further shown to the Court that the new representative of the architect had specially requested of the defendant

> "that the forms for the artificial stone work be gotten out at once, in order that there may be no delay" (p. 456),

and notice of this request by the Government was sent to the plaintiff February 3, 1912, with the statement:

> "We were under the impression that most of this work was ready. Will you kindly take it up at once and urge haste in the matter, and also that the specification requirements with respect to heavy dressed lumber be followed. There ought to be considerable of this dressed lumber, such as is used by pattern-makers, and we think that a good deal of it could be prepared now" (p. 456).

The plaintiff replied on February 5, the day preceding its application for second payment, practically declining to follow the request and suggestion of the architect's superintendent, and giving defendant no encouragement that it would do anything to hasten this matter of forms. Plaintiff writes as follows:

> "We have this day taken up the matter of forms, but as it is our intention to build these in place and pour most of the concrete, we presume very little of this form work can be gotten ready ahead of time. However, we will do all that is possible to do" (Exhibit X, p. 445).

This attitude on the part of the plaintiff, which had wasted so much time in so little preparation for this work, was sufficient in itself to deny the application then pending.

During the month of February plaintiff placed 105 cubic yards of concrete (p. 395), and at that rate it would have required thirty-one months for plaintiff to have completed its contract. It had been from September 15 to March 1, over 160 days, placing approximately one-sixth of the amount required by the contract (pp. 395, 151), which would have required at that rate thirty-one months to do the whole contract. There is no suggestion in the testimony or correspondence that there was any act or omission on the part of the defendant that delayed the work in February, and the Court should bear in mind that at this time the contractor was doing the least difficult and least expensive of the work, viz., the rough mass concrete of the basement (pp. 289-290, 304-305, 333, 342-344), yet the plaintiff's president (pp. 175, 180-181) and his man-in-

charge (p. 44) insist that all the concrete could be manufactured and placed complete in two hundred (200) days (pp. 44, 175-176, 180-181), but see, however, what plaintiff sought when the condition actually presented itself, viz., the full 300 days after 220 days of preparation (pp. 181, 160-161, 401, 435-437).

Notwithstanding these circumstances, plaintiff persisted in making requests for payment, *not of what was fairly and reasonably due under the contract* or at the cost of the work, contract cost or actual cost, as a progress or monthly payment, *but* in the amount of $9,000 (pp. 393-394, 395), *on the basis of what the defendant had been paid by the Government*, without any statement or claim that such an amount as $9,000 was due under the contract or by the terms of the contract (pp. 393-395). This should be considered in connection with the statement of plaintiff's president in his testimony that he "didn't want anything except payment in accordance with your contract" (p. 166), and that he "didn't want Mr. Carlin to pay you anything more than was due you under your contract" (p. 166), and the letters of the plaintiff to the defendant (Exhibits 18, 24), wherein attention is called to the fact "that we are not being paid in accordance with the terms of the contract" (pp. 393, 399).

In one breath President Converse says he wanted payments only in accordance with our contract (p. 166), and in another breath he says the payment of $1.07 per cubic foot "was not in excess of our contract (price) if you take the expense which Mr. Carlin had caused us during that ten or eleven months *hanging around here*" (p. 166); that "we were figuring what we thought was due us at that time"—"we thought we were entitled to it" (pp. 166-167). If paid at the said price of $1.07, he

would have received 150 per cent. of his contract price (pp. 152-153, 291). The defendant received on the revised schedule 35 cents a cubic yard for the same concrete (pp. 156-157, 289-290) from the Government.

There is certainly nothing in the contract which would warrant the plaintiff in making application and demand for payment for the cheapest and roughest concrete in the basement at a price of $1.07, which would give to plaintiff 150 per cent. of its contract price, and when it had been so dilatory in the performance of the work as to finish, quality and time, and when it had neglected and practically refused to take down work that had been improperly erected and rebuild it (pp. 74, 277-279) and to progress with the forms as requested by the architect's superintendent (pp. 74, 445, 456).

Requisition of March 9, 1912.—The next application for progress payments was made by letter on March 9, 1912, in the amount of $11,735.95 (pp. 394-395). This estimate, like those that preceded it, was made up in bulk and without a statement of the quantities into unit prices, notwithstanding the defendant, on or about January 24th, had specially requested a statement of quantities in the applications (p. 454).

However, either accompanying said application or following it, there appears a statement of quantities (Exhibit 19, p. 395). These quantities and the prices used are:

573 cubic yards concrete at $1.07 per cubic foot, and 3,460 square feet granite set at $.40, giving.....	$18,937.97
Deducting 15 per cent.....	2,840.70
Leaves	$16,097.27
Deducting payment.....	3,765.50
Leaves.....	$12,331.77
Reconstructing 14 piers (p. 172).....	300.00
Which made an application of.....	$12,631.77

At this time plaintiff was fully informed that the architect's representative had reduced the defendant's estimates or allowances to 35 cents per cubic foot (pp. 156-157, 247), or an aggregate amount of $8,000.

It is apparent that the plaintiff, in making its applications, did not use the quantities stated in its letter or did not use the prices which its president testified to (p. 395).

This application was followed by a telegram of March 13, 1912, "When send check amount work San Juan," from Boston (p. 396), which was replied to by telegram from the defendant, "Converse to come here Friday morning" (p. 396). In answer to that telegram Mr. Converse went to New York, and in the absence of defendant's president met the senior Carlin, who had had no connection with the work (pp. 103-104, 291-292). Mr. Carlin, Sr., examined the contract and discovered the price of $6.70 per cubic yard for concrete (pp. 20, 291-294), and, applying this price to the quantities stated by plaintiff's president, he arrived at a payment of $674, which was paid to and accepted by plaintiff's president (pp. 104-107). This took place on or about

March 13, 1912 (pp. 103-107), and the manner and method by which the amount was arrived at is fully explained in the testimony (pp. 291-294).

Plaintiff's president says that when he took the $674 he expressed his dissatisfaction with it, but he took the check (p. 104), which must have been some day after March 13. March 13 was the day on which the defendant advised the plaintiff that the wishes of the architect should be observed (p. 250), which virtually was a stoppage of the work (pp. 250-252), although on March 9 correspondence was begun between the parties in respect to the suspension of operations on the Federal Building (Exhibits 2, 3, 4, pp. 383-385), and then followed the correspondence with respect to the plaintiff's losses and expenses, its sending mechanics back to the States (Boston), and its recall and return of them to the work when the foundations were completed, etc. (Exhibits 4, p. 385; 23, p. 397; P, p. 439).

Since March 9, 1912, no written demands for payment seem to have been made by plaintiff on defendant, though the letter of April 25, 1912 (Exhibit 24, p. 399) complains that

> "we have not been paid in accordance with the terms of the contract, although we have endeavored to establish some definite methods to have the payments come to us regularly and on some basis mutually satisfactory" (p. 399).

In the testimony, however, the plaintiff's president recites an alleged conversation intended, it would seem, to establish a further demand for payments (pp. 106-107). This conversation is placed

"in the early part of May, around the 10th," in New York, and in the presence of three members of the Carlin family. The plaintiff's president recites that:

> "I complained that we had not received payments *in accordance with the terms of the contract,* or in accordance with the units agreed with his son, and that we had spent a very large amount of money, and *I wanted to be reimbursed for the money we had expended in those delays.* After considerable talk, Mr. Joe Carlin said, 'Well, how much have you spent?' I stated that I didn't have the books there and could not give the exact amount, but approximately $35,000. Mr. Carlin immediately responded to that, 'If that is it, you know what you can do.' And that about ended the conversation, and I got up" (p. 106).

From this conversation no demand for payment due under the contract can be deduced. The demand is that he

> "wanted *to be reimbursed for the money that we had expended in those delays,"*

and there is no suggestion of a demand for payment in that conversation (p. 106). The fact that he complained that plaintiff

> "had not received payments *in accordance with the terms of the contract* or in accordance with the units agreed with his son"

did not make it a demand for payments due.

The position of the defendant is and always has been *that payments were not due,* because the contractor had not complied with its contract; that it was not entitled to any $1.07 per cubic foot for concrete, and that its applications and demands were excessive and beyond any sense of reason; that it had not done and completed any of the work for which it had applied for payment; that exposed surfaces of the concrete work had not been finished (pp. 334, 294); that the granite had not been pointed and cleaned down; that the plaintiff had not shown its capacity to do the work in anything like the time required, and that in March, 1912, it had "gotten rid of" the master hand-worker and the modéller, who was capable of moulding the work and who possessed the secrets necessary to mix and cast artificial stone (p. 62); that its organization at San Juan was demoralized, inefficient and incompetent; and defendant was face to face with a situation that meant great loss and damage to it if the plaintiff did not prosecute, carry on and complete its contract, which it gave no evidence of its ability to do.

Estimate of March 9, 1912.—

The March 9, 1912, estimate of

573 cubic yards of concrete @ $10	$5,730
3460 square feet of granite @ 40c	$1,384
Gave	$7,114
Less 15% per Contract	1,052
	$6,062

as the total amount that was due to the plaintiff for the performance of its contract during the

period of approximately six months' active operations and thirteen months of inactive operation and preparation without any results. Of this $6,062, $3,765.50 had been paid, leaving at most a balance of $2,296.50, against which defendant had charges:

Hoisting engineer, oil, etc	$541.22
Painting and cleaning granite, 3,460 square feet @ 10 cents	346.00
Finishing concrete surfaces	300.00
Taking down and replacing Steel on fourteen piers (fol. 761), 50 tons at $10	500.00
	$1,687.22
leaving at most only	$609.28

to indemnify the defendant if the plaintiff defaulted. On March 15, 1912, defendant paid plaintiff $674 (pp. 103-104, 396).

To earn this $7,114 plaintiff had expended, according to its own statement, approximately $35,000, and it was demanding on or about May 10 that the defendant should reimburse it for the moneys expended (p. 106). In other words, the defendant had been benefited at most by an amount approximately $7,100 and had overpaid the plaintiff and the plaintiff had greatly delayed the work, had then stopped all work, though there were many forms and models to prepare and much stone to be cast in them, which it had been ordered and directed to do, and the plaintiff was demanding that defendant should reimburse it to the amount of $35,000. That was the situation on or about May 10, 1912. No competent, fair-minded jury and no Court can find any justification in these facts, which are indisputable, for the termination,

revocation or cancellation of a contract, for the non-payment of money. Said termination involved the smashing of a contract for $64,750, and the contractor has spent $35,000 to accomplish work of the fair cost value of $7,114, and that work not completed or finished, nor any part of it.

What Plaintiff Had.—Defendant says it spent $35,000 on its contract, and it will be interesting to inquire what they had on March 9th or May 22nd to show for it.

They had done on the building, but not completed, the following work only (p. 145):

or 573 cubic yards concrete at $10.....	$5,730
and (pp. 164, 395) 3,460 square feet granite at 40 cents.....	1,384
A total value of.....	$7,114
They had on the job (pp. 200-202) materials, plant and tools, alleged value.....	3,500
which they had offered to defendant at $2,334 (p. 440), or at a rental of $8.50 per day.	
Models and moulds in plaster [more than were required by the Government and more than necessary (p. 66), the yardage of which was very small (p. 38), about 183 tons (p. 110)]. The value of these stone cast were estimated by Mr. Converse at $15.75, or.....	1,575
but none were ever cast, and it is excessive to estimate the forms at the cost of the cast stone (p. 108).	
A total of less than.....	$12,189
which comprises everything that the plaintiff had or contributed to the job, and	

for which they pretend they paid $35,873.09 (the verdict), after giving credit for (p. 200).....	5,526
	$6,663

In other words, plaintiff recovered a verdict for $35,873 for an ostensible benefit to defendant at reasonable prices fixed by plaintiff of $6,663.

Applications by plaintiff at unit rate received by defendant from Government do not warrant the applications made.

Government Unit Prices.—At this time (March 9, 1912) the plaintiff was fully informed that the architect's representative had reduced the defendant's estimate or allowance for work done in concrete by an aggregate amount of $8,000 (pp. 156-157, 291, 343-344), and that the "unit or unit price used by the Government engineer (p. 235) when he makes up monthly estimates according to your (defendant's) schedule of amounts" (p. 392) had been changed (pp. 156, 342-344) to 35 cents per cubic foot (pp. *supra* and 289). Plaintiff wanted and expected the unit price of $1.07 per cubic foot for concrete "because that was what he (Carlin) got from the Government" (pp. 153, 290-291), but plaintiff's president "had my doubts" about ever getting it. "I had not seen the color of his money," he says (pp. 153-156, 166-167). There was a good reason for his doubts (p. 290).

The change by the architect's representative or Government's engineer in the unit price for concrete done by plaintiff was made about January 25, 1912 (pp. 242-243, 342-344, 290-291). Mr. Stierle, the first representative of the architect (p. 242), had

estimated to the defendant the work done for
months of October, November and December
$1.07 per cubic foot of concrete, and the plain
had been paid for work done during those mon
on requisition made December 30, 1911 (pp. 3
390), at $10 per cubic yard (pp. 289-290), which
had accepted February 2, 1912 (pp. 96, 289, 39
and up to which time he had no knowledge of w
defendant had received from the Government (
96, 290).

On Mr. Converse's own estimate and statem
that the cost of the concrete and artificial st
to plaintiff was $15.75 per cubic yard (pp. 110, 1
267), $10 was a fair and reasonable price for
coarse rough work that had been done in Octo
November and December, in the backing of
granite and heavy outside and interior walls of
basement (pp. 304-305, 319, and cf. pp. 154-1
177-180).

The plaintiff had been paid February 2, 1912,
work done by it to January 1, 1912 (*supra*), and
fendant was never paid or estimated any work d
by the plaintiff subsequent to December 30, 19
at the rate of $1.07 per cubic foot, but at a m
less rate, to wit, 35 cents and 50 cents per cu
foot (pp. 342-344, 290).

Mr. Converse was told on February 2, 1912, tha
reduction had been or would be made; that
Berryman, the architect's superintendent, had s
that defendant had been overpaid $8,500, and t
the amount would be deducted from defendant's
timate (pp. 290-291, 242). Defendant had a
been warned by Mr. Guerini, who brought about
displacement of Captain Stierle, and who acc
panied his successor, Mr. Berryman, to San Ju
and who advised defendant that there would be

investigation (pp. 236, 238-239, 242-243, 247, 441, 451, 454-455).

With these indisputable facts before the Court (pp. 290-291, 392, 151, and cf. pp. 152, 154-156), and the written letter of February 6, 1912, four days after the conversation that "In accordance with your instruction to Mr. Converse we have made our January Requisition in the units and unit price used by the Government *when he makes* up monthly estimates according to your schedule of amounts" (p. 392); the plaintiff wholly failed to make its January requisition *in the unit price(s)* used by the Government engineer, which were 35 cents and 50 cents per cubic foot (pp. 290-291, 342-344), and not at the unit price of $1.07.

So, if we accept Mr. Converse's own statement that he was to get the prices allowed by the Government to defendant, he was entitled to only $10 per cubic yard, or 35 cents a cubic foot, and his applications were, therefore, exorbitant and not in accordance with the contract as he says he intended they should be (p. 166), nor were they in accordance with his letter which accompanied his application (p. 392), as he well knew (p. 290).

None of plaintiff's work done was ever completed within the terms of the contract and specifications, so as to entitle plaintiff to even progress payments.

The work undertaken can be divided into three classes:

(1) Preliminary.—Forms and moulds for casting concrete, as follows:

(a) Models or moulds in plaster;
(b) Forms or moulds in wood.

(2) Permanent.—Mixing and placing concrete (pp. 12, 20).

(3) Permanent.—Setting of granite (pp. 20-21).

It was mutually understood that the plaster models or moulds should be first undertaken and prosecuted and cast (pp. 37, 66, 77-78, 279), for the reason that it depended almost entirely upon the work of one man, Mr. Guerini (pp. 62, 67, 257), and for the further reason that it required a long time for the concrete cast in the plaster moulds to cure (pp. 277-278), and for the still further reason that samples had to be made and submitted to the Government architect or his representative for approval (pp. 417-418), not only as to the coloring and likeness to real sandstone (pp. 78, 281), but as to the jointing or elimination of lines of demarkation of one day's work from that of the succeeding day's work (pp. 65, 78-79, 66, 277, 285-286).

The contract in no way made any provision for progress payments to the plaintiff for preliminary work, such as shops, sheds, shanties, machinery, moulds, models and forms, but payment was to be made for the number of cubic yards or cubic feet of concrete manufactured and placed in the walls or placed in the buildings, and for the granite actually set per square foot of surface exposed (pp. 20-21). The plaintiff had its vice-president, Mr. Guerini, who was an artist and modeler (pp. 62, 66, 92, 257-258, 274), at the site of the work from early January, 1911 (pp. 65, 93), until the middle of September (pp. 67, 162), getting ready to do something (pp. 66, 257-258), and throughout this period of time, assisted by one or two men, over whom was the man-in-charge, Follett (pp. 37, 256-257, 110), making about thirty moulds or forms of an average size of one foot wide, one foot deep and three feet

long, out of wood frames or boxes filled with plaster of paris (p. 257). Not a single stone was cast (pp. 110, 162, 257) nor any work whatever done for the building or for which any payment could be demanded under the terms of the contract (pp. 18, 12, 20, 67, 77-78, 162, 257). The plaintiff did not even secure the approval and acceptance of the Government's architect or its representative either of the artificial stone to be supplied (pp. 78-79, 143, 171, 285-286, 319-320), or of the jointing of one day's work with the next. Nothing whatever was done with these molds and forms (or what has been characterized as the preliminary stage of the work), nor was anything ever accomplished for which any demand of payments could be made by the plaintiff on the defendant (p. 323). Nothing was ever claimed for this work in the applications, specifically or otherwise.

That this would be so was evidently understood by all concerned—by the plaintiff, by its president, its vice-president and its man-in-charge (pp. 37-38, 279-280, 92-94), and by the defendant, its president and its superintendent-in-charge (pp. 256-257, 279-280). All anticipated that this would take a long period of time, and that nothing could be done until it was accomplished. Both parties and their officers and representatives likewise were on the work, saw what was going on, knew the situation (pp. 38-39, 64-65, 68, 94), and appreciated that nothing could be done until the foundations were ready and the granite set, and nothing on the exterior front of artificial stone until the samples and jointing were approved by the architect (pp. 417-418).

No payments were due and owing on account of the concrete made and placed in the basement walls, piers and first floor, for two reasons, (1) that it was

never finished or completed (p. 334), and (2) that it was never done to the satisfaction of the architect or the general contractor (pp. 294, 140-141, 301).

Nothing was ever due for the setting of the granite, because it likewise was never finished and completed, in that the pointing was never done and it was never "cleaned down" (p. 334), and it was never done to the satisfaction of the architect (pp. 140-141, 294).

To entitle plaintiff to payment for work done, it must have been shown that the work was done to the satisfaction of the architect and of the defendant. All the proof was to the contrary.

The contract, Exhibit 1, requires the work to be done

> "under the direction and to the satisfaction of the general contractors (defendant) and James Knox Taylor, acting as agent of the owner or his or its representative" (p. 12).

The contract further provides that the defendant will pay the lump sum price stated "in the manner and upon the conditions above set forth" (p. 21), which conditions embody the covenant to perform and finish "under the direction and to the satisfaction" of defendant and the architect.

This, it is submitted, makes the satisfaction of the architect and the defendant a condition precedent to payment.

No satisfaction of either the architect or of the defendant was shown at the trial (pp. 140-141, 294), and the pleadings contain no allegation of waiver, fraud or bad faith which would relieve the plaintiff from said covenant and condition

precedent to do the work to the satisfaction of the architect and the defendant. For the reason that there are no pleadings with respect to the satisfaction or dissatisfaction of the architect and defendant, no evidence should or could be admitted thereon. However, the defendant did show, without objection on the part of the plaintiff, that the defendant was not satisfied (p. 294), and offered to show and establish that the architect was not satisfied (p. 294), and that the architect's representative had so declared himself (pp. 242-243).

There being no proof that the work was done or the materials furnished to the satisfaction of the architect and the defendant, no payments became due under the contract, and, therefore, nonpayment by plaintiff could not be made an excuse for the revocation, rescission or termination of plaintiff's contract with defendant. The plaintiff well knew that the work had to be done and completed to the satisfaction of the architect and defendant (pp. 140-141, 174).

The delay of March 9, 1912, was caused by the directions of the architect's representatives to Mr. Follett, the man-in-charge for plaintiff, "to put in no more floor" (p. 250). Later defendant's superintendent at the work received a cable from defendant's New York office that the work might be stopped a day or two later (p. 250). On or about March 13 the said superintendent had a talk with Mr. Follett, plaintiff's man-in-charge, in which the latter inquired if he should stop work, and defendant's superintendent told him that "the wishes and desires of the supervising architect must be respected" (p. 250), upon which the plaintiff

> "got their tools together, picked up and cleaned up and straightened up, and there

> was no more construction work done by them" (p. 251).

The work was stopped in order to make an investigation (p. 249) by the architect's representative on behalf of the Government. A slight crack had appeared at or near the northwest corner of the building, which seemed to indicate some settlement, and the Government insisted upon investigating (pp. 248-249). Shortly after, the Government sent Mr. Heald, an engineer, to further investigate, and the defendant furnished to the Government, at the Government's expense, a gang of men with tools to make that investigation (pp. 249-250). After these investigations, on or about April 1, Mr. Heald ordered the work to be stopped, and directed the defendant to underpin and shore up the foundations, taking a part of the northwest corner of the building at a time and going along consecutively (p. 249).

For this work of investigating and for underpinning and strengthening the foundations the defendant was paid by the United States Government (p. 321), and no question was ever raised but that the defendant, in its operations in the construction and completion of the foundation, had done all that its contract required of it, and there is not one particle of proof but that the defendant provided

> "all labor and materials included in its contract in such manner as not to delay the material progress of the work,"

or that the underpinning and strengthening were required by reasons of any default or failure on the part of the defendant (pp. 17, 295-296, 321-322).

It is, therefore, to be noted that the settlement crack or any defects in the foundation were not the result of any omission, default or failure on the part of the defendant, but were owing to the presence of an old fortification or fortress wall almost immediately underneath the settlement crack, and which was unknown to the Government or to the parties (pp. 249-250), and that the plans furnished by the Government were, therefore, defective for the site selected on which to build.

This was possibly due to some neglect or default on the part of the Government in not making proper soundings or adopting other means to locate said fortress wall, and defendant maintains that this situation and any delay resulting from it is cared for in Clause 7th of the contract, which provides:

> "Should the sub-contractor be obstructed or delayed in the prosecution of the work by neglect, delay or default of the owner (The U. S. Government) the architect, the General Contractors or of any other contractors employed by them upon the work. * * * through no fault of the sub-contractor then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid * * *,"

and Clause 10th provides:

> "10th. Should the proper, workmanlike and accurate performances of any work under this contract depend in any way upon the proper, workmanlike or accurate performance of any work by another contractor on said building, the Sub-Contractor agrees

> to use all means necessary to discover any defects in such contractor's work, and to report the same in writing to the General Contractors before proceeding with his work which is so dependent; and shall allow the General Contractors a reasonable time in which to remedy such defects, it being the intention of the parties hereto that the entire work on said building shall be properly performed in a workmanlike manner";

and this also shows that delays of this kind were contemplated by the contract and provided for. Here was a defect in the defendant's work not due to any omission, default or failure on its part, but from insufficient plans furnished by the Government, and it was as much the duty of the plaintiff "to use all means necessary to discover" this defect and "to report the same in writing" to the defendant "before proceeding with his work, which is so dependent" upon it, as it was for the defendant to discover it and correct it; but the contract goes further and states that the sub-contractor

> "shall allow the general contractors (defendant) a reasonable time in which to remedy such defects, it being the intention of the parties hereto that the entire work on said building shall be properly performed in a workmanlike manner" (p. 17).

As stated before, *every clause in this contract is to avoid and prevent a rescission or termination* of the contract by either party. It is a contract adopted and approved by the American Institute of Architects and by the General Association of Contractors throughout the continent, and

is the result of long study and preparation among builders and architects.

If every brief delay could be made the subject of a rescission or abrogation of the contract by any sub-contractor who had discovered that he had made a bad contract and was losing money, the owner or general contractor might as well have no contract. No such intention is apparent from a careful reading of all of the clauses of the contract between the parties.

The construction applied to it has led, as might be expected, to an excessive verdict and to a most extraordinary result, in giving to a sub-contractor $45,000, where and when under a contract it was entitled to less than $7,000 for all the work it had performed.

Time or date of beginning work under the contract.

The plaintiff in its letter of revocation or termination of the contract, dated May 22, 1912, and after numerous other letters to the contrary endeavored to make out and to establish that the defendant "insisted on our starting work on the San Juan job" in January and February, 1911,

> "and stated that the granite base would be up and ready for our work by June 1st" (Exhibit 25, p. 400).

It is assumed that this statement is based upon one telegram sent to plaintiff by defendant January 10, 1911, as follows:

> "Send bond for Porto Rico immediately. Work must start at once" (p. 386).

The testimony and correspondence show that neither the plaintiff nor the defendant considered the said telegram as a direction to commence work on the Federal Building (pp. 37-38, 66, 77, 279-280, 448).

That the plaintiff did not consider this telegram as an order or direction to commence work is fully established by the correspondence and by the contract itself, when construed in connection with the knowledge possessed by the plaintiff, its officers and agents (pp. 68, 436). The contract expressly provides:

> "6th. The sub-contractor shall and will proceed with the said work, and every part and detail thereof, in a prompt and diligent manner, *and shall and will do the several parts thereof at such times and in such order as the general contractor or architect may direct,* and shall and will wholly finish the said work, * * * and this contract in 300 days *from the date upon which the building is ready to receive his work* and after he has been notified to proceed by the general contractor * * *. The sub-contractor further agrees to begin work at the building within three days from the time that he is notified by the General Contractor that the building is ready to receive such work" (p. 15).

The testimony and correspondence show conclusively that the plaintiff, its officers and agents were on the ground, observed the conditions and knew the circumstances at the site of the work from and after January, 1911 (pp. 68, 436), and that they knew that no work could be done upon

the building proper, for which payments were to be made, until the foundations were completed, which was about September 1, 1911 (pp. 37-38, 77). That about that time the plaintiff accepted the option exercised by the defendant, to set the granite for the building, behind and upon which granite the plaintiff was required to place its concrete (pp. 401, 435); that at or about this time the contractor was very solicitous in having the time or date fixed from which the 300 days should be counted, and at which it should be considered to have commenced its work (pp. 181, 434-435, 437).

As early as July 10, 1911, plaintiff writes:

> "We wish the matter to be recorded by letter as to the date of the beginning work on the San Juan job" (p. 437).

Again, on September 6, 1911, plaintiff writes:

> "We have not yet received a letter from you fixing date when we may commence our work at the San Juan job. As there is a fixed time for completion in our contract, we desire to have this date made a matter of record" (Exhibit I, p. 434).

On September 15, 1911, defendant writes to plaintiff:

> "In reply to your communication regarding an order to proceed with the work at Porto Rico, we would say that we understand you have already proceeded, having been on the ground for some months. However, to make it explicit, please proceed at once to go forward with all the work you have under contract, and particularly with concrete walls and granite work up to

> and including the finish of the first floor" (Exhibit 26, p. 401).

To this the plaintiff replies under date of September 16, 1911, acknowledging receipt of letter of September 15:

> "We note that you order us to proceed with the granite work, which we understand is in accordance with Section No. 25 of the contract" (pp. 20-21). "As San Juan is so far away, please give us *as much time as possible,* in order that we may be prepared to start any work which we are able to do. We cannot land men and equipment on the job without considerable notice" (Exhibit J, p. 435).

It is difficult to understand how anything could be more explicit in respect to commencing work under a contract than it is expressly stated and designated in this correspondence; and it does not need a building contractor to see and understand that the plaintiff was securing and obtaining from the defendant a date certain from which to measure the 300 days in which he was to do and to complete its work (p. 181). Plaintiff's president admits it in his testimony, and yet in spite of this correspondence and of the admissions of the president, the plaintiff in its letter of revocation and cancellation of May 22, 1912, seeks to exaggerate and enlarge the alleged period of delay, and to swell its damages by including all that it had disbursed from January, 1911, to May 22, 1912 (pp. 399-401). That was the manifest purpose and intention, and that was what was accomplished before and by a Porto Rican jury (see Verdict, pp. 32-33, 380-381).

POINT IIIb.

(b) Stoppage of work by Government to make an investigation.

(REFERENCES ARE TO MARGINAL PAGES.)

This stoppage of the work was made on the report of a special representative of the Government's supervising architect (pp. 42, 83, 249-250), by direction of the Government (pp. 249-251; Exhibits 2, 3, 4, pp. 383-385), not by reason of any dereliction or default of the defendant (pp. 295-296, 321-322), but because a settlement had been discovered at one point (pp. 83, 249), over an old fortress wall (fols. 745-747), shown by "a small hair crack" in the exterior basement wall (pp. 247-249).

The investigation had been prophesied some time by or before January 25, 1912, by Mr. Guerini, who told defendant's superintendent that "there would be an investigation" (pp. 247, 134-136, 137). Mr. Guerini had meanwhile been discharged by Mr. Converse (pp. 133-137, 89). "We were to get rid of him," as the latter expressed it (pp. 136, 89), and the information reached plaintiff's man-in-charge, Follett, before the defendant knew about it (p. 250).

This act of the Government's agent was perfectly proper under its contract and specifications (pp. 412, 12, 15, 17), was something that any experienced builder might anticipate, and defendant claims it was such a change as fairly and reasonably would be in contemplation of two experienced builders

that the plaintiff (p. 92) and defendant were (p. 276).

The plaintiff and defendant from the beginning had the Government specifications (pp. 139, 438) and read them clear through (pp. 139-141), and likewise the plans (pp. 438, 288), and knew that the work had to be done under the direction and to the satisfaction of the architect or his representative (pp. 140, 139-141) by its own contract with defendant (pp. 12-13), as well as by the contract between the Government and defendant (pp. 12, 139-141, 287, 438, 411-412), and plaintiff as well as defendant knew *then* that the Government contract reserved the right

> "to suspend any portion of the work embraced in the contract whenever, in its opinion, it would be inexpedient to carry on the work" (p. 412),

and whether the plaintiff *was bound by such clause* as if it were a covenant or provision of its contract with defendant or not (having in mind the decision of the United States Supreme Court, p. 7); the plaintiff knew it was there from the beginning (pp. 12, 139, 287, 438) and had read it, and it certainly is very material and competent in determining what the parties had in contemplation when they entered into the undertaking, when they engaged in the work, and when the contract was rescinded May 22nd, 1912.

Plaintiff and Defendant in Accord.—The disposition and mind of the plaintiff is clearly set forth in the correspondence between March 13 and May 22, 1912 (Exhibits 2, 3, 4, pp. 383-385; Exhibits 23 and 24, pp. 397-400; P, p. 439; X, p. 445; MM, p

456), and plaintiff has created in that correspondence a complete *estoppel* forbidding it from taking advantage of the situation to rescind or terminate its contract with defendant (pp. 400-401, 456-457). Certainly it has, unless it gave defendant due and timely notice of its change of position as stated, March 9 (Exhibit 2, p. 383), and also demand reimbursement under the contract as provided therein. No such notice or demand was made.

The defendant acted strictly in accord with the position assumed and maintained by plaintiff. On March 11 defendant, answering plaintiff's letter of March 9, refers plaintiff to the contract, which provides in substance (p. 17) what plaintiff had embodied in its letter March 9 (p. 384).

The contract says:

> "11th. The general contractor (defendant) will provide all labor and materials not included in this contract in such manner as not to delay the *material* progress of the work, and in the event of failure so to do, thereby causing loss to the sub-contractor, agree that they will reimburse the sub-contractor for such loss * * * the amount of such loss or damage * * * to be fixed and determined by the architect, or by arbitration as provided in Article 3d in this contract" (pp. 17-18).

When the plaintiff received preliminary notice that the work might stop, it immediately wrote and sent a letter to defendant's San Juan office (Exhibit 2, pp. 383-384) asking for *"written instructions"* pending the investigation of the founda-

tions, and stating their position and what their loss and damage would be, as follows:

> "If we discontinue our work we shall have a part of our force of men on our hands whom we brought from Massachusetts and whose pay will have to continue while they stay in Porto Rico. On the other hand we have an agreement with these men whereby we can discharge them and pay their passage (equivalent to 2d class on the N. Y. P. R. S. S. Line) from San Juan to Boston including their wages during transportation. *We make you aware of our position in this matter as you are responsible for our expense due to delay caused to us by the suspension of work* and so it is your option whether the men shall remain in San Juan on pay or whether they shall be sent to Boston and brought back at some future time *in which case the transportation charges* as above outlined *would have to be paid both ways by you.* Please let us have your orders in regard to this matter at your earliest convenience as that will save unnecessary expense to yourselves" (p. 384).

Mr. Oaksmith, the defendant's superintendent, says that on March 13, 1912 (p. 250), he told the plaintiff's agent, Follett (p. 384), that "the wishes and desires of the supervising architect must be respected," whereupon the plaintiff stopped all work (p. 251).

Following this, defendant's superintendent on March 23rd to 25th asked plaintiff's agent to give him "how many men you have and of different classes and of the different prices" (wages); and was told by plaintiff's agent "to go to hell; I don't

have to give you these names and prices; it is my business and none of your business" (p. 251). Whereupon defendant went to his office and sent a letter making a similar demand for "daily item of expenses to which you may be subject" beginning March 10 (Exhibit 4, p. 385, and see p. 400). These acts are strictly in accord with the contract between the parties (pp. 17, 15).

This is further shown by plaintiff's further notice that "If these matters cannot be satisfactorily adjusted between us, it will be necessary for us to take it up with Washington" (p. 394), which, of course, meant the "Architect" (pp. 12, 18).

Parties adhered to their Contract.—March 29, 1912 (Exhibit 23, p. 397), further assurance is given to defendant by plaintiff that he is following the contract strictly and by saying *that the length of time necessary to put the foundations in condition demanded by the Government* is indefinite, estimated at from four weeks to five months, and

> "owing to a vagueness in our minds as to who is responsible for our money losses caused by this stopping of our work, we find that it is important for us to guard against any unnecessary expense on our part. In view of this we have decided to return our men brought here from the states for this work to Boston until such time as the foundations are completed, the first floor structural steel is in place and the building as a whole is ready for us to continue our work with a reasonable assurance that our work can be pushed without the continual series of delays that we have so far to undergo. We have immediate use for

these men in the states and they will be brought here as soon as the above conditions have been fulfilled.

"We have fourteen men on our payroll who came here from the states and who have been idle for three weeks because of this stop in the work. They are becoming discontented, and although they are receiving full time pay they are getting restless and want to return to the states. This is much more important here than it would be in the states as there are no competent carpenters, moulders or concrete men for our class of work among the natives. However, if you can arrange with them to work for you until such time as we can profitably put them on our own work we are willing that you should do so with the understanding that you will release them to us at that time and pay us 20% of their payroll in order to cover us for house rent, light, ice, etc., which we are supplying to them without charge to them. Please let us hear from you in regard to this as soon as possible as we are planning to have them leave on the boat for New York sailing April 3d.

"About your request that we should rent you our concrete mixer we will do so for the sum of eight dollars and fifty cents ($8.50) for each week day except holidays from the time you take it until it is returned to us in as good condition as when you take it. This price to include the use of our half yard mixer, electric double drum hoist, concrete elevator with steel bucket and wire fall, cement storage shed, track and car for taking stone to the mixer and electric wiring and

water connection, electric current for operating the mixer and hoist. We do not include the labor or any repair work after you take the outfit.

"Yours truly,

"GUERINI STONE CO.,
"By G. A. Follett."

Here is an express declaration of what plaintiff would do, and which defendant acted upon and believed.

On April 3 plaintiff sent its men to the States and stopped further expenses and losses (pp. 81-82, 88), except that Follett remained until July 1, 1912, drawing his salary.

Plaintiff's agent says in so many words that the men were sent home to the States "to keep down the expenses," which losses and expenses it charged defendant with "and expected to be reimbursed for" (pp. 81-82); and plaintiff's agent says in his testimony, as well as in his letter, that he expected to do the work with these men by bringing them back when the delay ceased (pp. 81, 397).

So far as the defendant was concerned, the stoppage of the work by the Government and the delay to plaintiff's work was a closed chapter. The plaintiff had acquiesced in the delay, sent its men to the States, had cut off practically all losses and expenses, and had declared its intention of bringing back the men and proceeding with the work when the delay ceased.

Defendant contends that the plaintiff was estopped under the circumstances from revoking, rescinding and terminating its contract with defendant fifty days after (April 3 to May 22).

Notices to Progress Work.—Acting upon the suggestions contained in plaintiff's letters, but not until April 2 or 3, 1912, defendant sought to avail itself of the plaintiff's proposal to employ its mechanics, whom it had brought from the States, and to rent its concrete and elevating machinery (Exhibit P, pp. 439, 251). In this letter, which is an answer to plaintiff's of March 29, notice was given to plaintiff that the work outlined by the Government engineers would require about two months to completely finish it, and that the entire south wall and the entire east wall would be "completely ready for your work *in not more than two weeks*, and the only delay will be on the north wall," where the crack and settlement had taken place. Defendant further advised that "as you have much exterior form work to prepare in advance of pouring the concrete, it certainly seems that this should be done now."

This *constituted a notice* to the plaintiff *that within two weeks* it should proceed with its work on the south and east walls, which comprised about one-half of the building, and pointed out that it had much *exterior form work to prepare in advance* of the pouring of the concrete, which it had not theretofore built or made (fol. 1315). It was only the floor work that had been held up (fols. 748-749).

That this was so is shown by the exchange of letters between the parties, of February 3, 1912 (Exhibit LL, p. 456), and plaintiff's letter of February 5, 1912 (Exhibit X, p. 455), in which plaintiff says:

> "We have this day taken up the matter of forms, but as it is our intention to build these in place and pour most of the concrete, we presume very little of this form

> work can be gotten ready ahead of time. However, we will do all that is possible to do" (p. 445).

Instead of keeping the men and preparing this exterior form work, so that the work could be progressed at the end of the two weeks named, the plaintiff sent its men to the States (pp. 81, 84). No work was done by plaintiff after March 9, 1912 (p. 81).

By the express terms of the contract (Exhibit 1, p. 15) the plaintiff was required to *proceed* with the work, and every part and detail thereof, in a prompt and diligent manner, and to do "the several parts thereof at such times and in such order as the General Contractors (defendant) or Architect may direct" (pp. 15, 12); and here was an *express* direction by the defendant, made at the request of the architect's representative on the work (Exhibit P, p. 439). It was very important that *the exterior form work* should be done and some of it poured so that the acceptance and satisfaction of the architect, or his representative, could be had as to *samples* of artificial sandstone and as to the jointing of succeeding days' work, had to be approved before plaintiff's work could proceed. No approval of samples or jointing was ever secured by plaintiff. No exterior stone was ever cast by plaintiff.

The explanation of why the defendant did not utilize plaintiff's mechanics, who had been brought to Porto Rico, is contained in this same letter of April 3 by Mr. J. P. Carlin, defendant's president, as follows:

> "Upon my arrival, the writer endeavored to use your men wherever possible, but for some reason they refused. We are ready

> now to use these men, and can see no reason to pay you a percentage on their wages, as their cost to us is more than local labor. Again, the object of using them is of mutual benefit, to keep them here and expedite the progress of your work" (p. 439).

This is in reply to the proposal of March 29 from plaintiff, that the defendant should employ plaintiff's men "and pay us 20% of their payroll, in order to cover us for house rent, light, ice, etc.," practically denying to defendant the privilege of employing plaintiff's men at whatever wages or compensation they might arrange with the men themselves. The question of renting plaintiff's concrete plant is also disposed of in this letter of April 3, 1912 (p. 439).

Demands for Reimbursement.—From April 3 to April 25 (twenty-two days) no exchange of communications seems to have taken place between the parties, until April 25, in a letter of that date from plaintiff to defendant (Exhibit 24, p. 399). This letter starts out by reciting that on March 9 plaintiff wrote a long letter regarding its contract and stating that up to this writing "we have received no reply from you" (p. 399). This is manifestly untrue, as plaintiff itself put in evidence Exhibits 3 and 4 (pp. 128-129), and no objection whatever was made to the introduction of Exhibit P of April 3, 1912 (p. 296).

Plaintiff in said letter then takes up the subject of progress payments (p. 399) and the *"very large extra expense on account of your delays,"* and says:

> "We must insist upon *the cost of these delays* being arbitrated at once, in accordance with the terms of the contract, and we

> can only proceed with the contract on the basis that the damages be now adjusted so that we can proceed with our work on a new and fresh start."

There is no suggestion *as to what delays are intended* or what the very large extra expense was. It seems very unlikely that the letter refers merely to the delays from March 9 to 10 to April 25, as the extra expense for that period of time had been definitely stated by the plaintiff in its letters to defendant, and consisted only of the payrolls of the men who had been idle in San Juan and who had refused to accept employment with the defendant (p. 439). As the delays from March 9 to April 25 were definite and certain, there was nothing to be arbitrated with respect to them, and if plaintiff's letter of April 25 referred to delays prior to March 9, they had been waived, condoned and cancelled by reason of the acts, conduct and delays caused by the plaintiff itself (*infra*, Point II).

Continuing, the plaintiff says:

> "We must be relieved from all responsibility as to our work cracking, as we understand that it does not rest upon foundations as originally called for at the time our contract was made" (p. 399),

and here the plaintiff is seeking to take advantage of the Government specifications, which it seeks to repudiate when the defendant urges that the plaintiff's work should be done with respect to and in keeping with such specifications as those regarding the suspension of the work (p. 412).

Continuing, plaintiff's letter reads:

> "We are ready and willing to meet you as far as possible, but are unwilling to bear expenses which are caused by your inability to let us proceed with the work in a reasonable and consecutive manner, as required by the contract" (p. 399).
>
> "We understand that you asked our men in the field something *about expenses for delays,* but it is very indefinite as to what you refer to, and our men in the field are not the ones to apply to in such matters. Your New York office should write this office (Boston office) regarding any important matters regarding this work" (p. 399).

While this letter of April 25 *does not recall or revoke any part of plaintiff's letter of March 29, 1912* (Exhibit 23, p. 397), and does not express *any change in the position* of the plaintiff that *it will recall or return its men from the States* or Boston *when the foundations are completed* and the building as a whole ready to continue the work (p. 397), it does attempt to take advantage of the situation and to force the defendant to settle any and all differences between the parties and to pay the

> "very large extra expense on account of your delays, and * * * the damages we have sustained * * * so that we can *proceed with our work on a new and fresh start*" (p. 399).

To say the least, the letter is a threat to take advantage of the situation and to force the defendant to compromise or settle all differences between the parties.

Plaintiff has also utilized this letter (pp. 107, 399) as an alleged notice under the contract between the parties (pp. 17-18, 13) for a submission to arbitration under Clauses 11 and 13 of said contract (p. 399).

The contract, Exhibit 1 (pp. 12-21), makes no provision for frequent and successive arbitrations during the performance of the work, and it makes no provision for the progress or monthly payment of losses, expenses and damages to the sub-contractor, and the request for a submission of expense and losses from delays during the progress of the work was to say the least premature (p. 399); and considering the situation in which the plaintiff stood to the work, its relations to its vice-president, Mr. Guerini, the artist and master hand in moulding and casting artificial stone, the realization that the work was costing them more than they could possibly demand from the defendant was sufficient to bring forth such a letter as that of April 25, 1912 (Exhibit 24, p. 399).

At the time this letter of April 25, 1912, was written (Exhibit 24, p. 399) the plaintiff had been directed to proceed with its work on the entire south and east walls of the building (Exhibit P, p. 439), and there is no suggestion on the part of the plaintiff, either in the testimony or in the letter of April 25, 1912, that it could not have proceeded with its work economically and efficiently, and there is nothing whatever in the contract that in any way warrants the plaintiff in requiring the foundations *to be completed,* the first floor structural steel in place, and the building as a whole ready for it to continue its work with a reasonable assurance that its work can be pushed (pp. 397-398) before it would bring back its men from the States (pp. 397-398) and proceed with its

work, as the whole contract contemplates that the work of the plaintiff and the defendant should be conducted contemporaneously, as the work of either depended upon the progress of the other. No concrete could be placed between the steel beams of the floors and partitions until the steel itself was erected. The plaintiff did the concrete work and the defendant the steel work. The defendant tendered and offered to the plaintiff on or about April 17 fully one-half of the entire building, and directed it to proceed with its work (p. 439), and twenty-two days thereafter the plaintiff raises the question of reimbursement *for all losses and expenses due to all delays and otherwise.*

Rescission of Contract.—No exchange of letters appears to have been had from April 25 to May 22, when the plaintiff unqualifiedly revoked, rescinded and terminated the contract (Exhibit 25, pp. 400-401). In that letter of May 22, 1912, plaintiff complains that the defendant in January and February, 1911, insisted on its starting its work on the San Juan job (p. 400); that they were delayed by the non-arrival of granite; that

> "about the first week of March, 1912, we were again required to stop work owing to changes to be made in the foundations";

that

> "we continually called your attention to the interruption in our work caused by these delays and the very considerable cost and damage to us caused by your breach of contract" (p. 401; no proof whatever of this assertion);

that

> "during the whole of this time we have been unable to get payments from you *in accordance with the terms of the contract*";

that

> "on May 11 we urged that this matter of damages be arbitrated, but you refused to agree to this, and you could give us no assurance that even now we would have an opportunity within any reasonable time to progress with our work."

This is followed by a general and omnibus allegation of breaches, delays and damages (p. 401). The letter is evidently the handicraft of a member of the legal profession and was written full of self-serving declarations in the hope of establishing good grounds for a revocation, rescission and termination of plaintiff's contract. It was sent by registered mail, Boston, May 22, 1912 (p. 400).

This letter terminated the contract relations between the parties and was answered on May 31, 1912 (Exhibit MM, p. 456), with a statement that

> "said letter is a breach of contract on your part, and we shall immediately proceed to have the work done by other parties, and shall charge you with the additional expense, if any, above your contract price" (p. 457).

The defendant submits that the revocation, cancellation and termination of the plaintiff's contract by its letter of May 22, 1912 (Exhibit 25, pp. 400-401), was unwarranted, unjustified and a

breach of its contract with the defendant; that the plaintiff's conduct and the position which it took upon the stoppage of the work, March 9, 1912, as expressed in its correspondence, and without any testimony or proof of any other or different position, created *an estoppel* which prevents any conclusion of law, or any verdict, or any instruction to the jury, that the plaintiff had a right to terminate or rescind or revoke its contract in the manner expressed in said letter of May 22, 1912 (Exhibit [illegible], pp. 400-401).

Apparent Reason for Termination of Contract.—The Court can well appreciate the position of the Guerini Stone Company (Mr. Converse) in the spring of 1912. Mr. Converse had taken over the performance of a contract for an artificial stone building (pp. 92, 133-134), in a foreign tropical city in which he was a stranger, without any experience in artificial stone work of the character required (pp. 129-131, 144), and in the belief (?) that it was plain ordinary concrete stone work (pp. 129-131, 144-145, 177, 179-181) and no more expensive than ordinary concrete (pp. 145-148), and that it could be made and poured for $15.75 per cubic yard (pp. 110, 108-114, 148-151), including everything. Converse, by a long dissertation on the fair and reasonable cost of the work, which he did and was to do (pp. 108-111), at the prices he expected to pay and actually did pay (pp. 111-112, 148-149), which he says were and are fair and reasonable, says the concrete was worth $15.75 per cubic yard (pp. 110-112, 151). He had figured on that basis that there was a profit of $9,738 in the job (pp. 108-111, 148-151) and had entered upon the work with a Senor Guerini, an Italian, with whom he had only a scant acquaintance (pp. 133-134, 139-140, 142-144, 148). Later he discovered him to be "a

bad actor" (pp. 62, 134-136, 166, 169, 171, 441, 451-452) and got rid of him (pp. 89, 136-137, 133-134).

The situation of Mr. Converse at this time, middle of February, 1912, is perfectly apparent. Mr. Guerini had been dismissed; he had been *a bad actor;* he had complained about the work (p. 135), had complained about the architect's representative (pp. 135, 235), had quarrelled with Mr. Follett, the "Man-in-Charge" (pp. 76, 170, 234, 236-238, 241, 451), had complained about the foundations (p. 135), had been called to Boston by Mr. Converse and talked to, and he went to Washington in a complaining mood (pp. 135-138, 236, 238-239, 247, 333) and was talking indiscriminately (Exhibits R, p. 440; S, p. 441; GG, p. 451; JJ, p. 454), and the correspondence referred to should be compared with the witness Converse's *denial of any knowledge* about the matter (pp. 133-138).

After all this talk and threats we find Guerini returning from the States and from Washington with a substitute representative of the Government's architect, who immediately stirred things up (pp. 247-250, 330) and began an investigation and displaced representative Stirle, with whom Guerini had quarrelled (pp. 135-138, 236-239).

It is significant that the first information that defendant's officers or employees had of any investigation (p. 247), or that the work was to be stopped (p. 250), was from the plaintiff's officers and employees, instead of from the Government or its local representatives (pp. 247-250).

Mr. Converse was in a dilemma. Guerini was uncontrollable, an irritable, overbearing trouble-maker, yet he was the masterhand in the manufacture of artificial stone (pp. 62, 66, 77-78, 274) and could not be dispensed with, if Converse was to do the job (p. 133), notwithstanding his statement

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in a letter that he had "another man who is capable of modelling and in handling concrete in its most ornate forms" (p. 452). This man seemed to have been Mr. Follett (pp. 443, 452), but he was in no wise qualified (pp. 59-62, 65-67, 129-131, 236-238, 241).

He says his men had become discontented and restless (p. 398) and he had spent, per his bills and statements, and the verdict obtained, $35,000 (pp. 106, 402) to do 25 per cent. of the quantity, not value, of the work, for which he was to receive only $16,000, and he had actually done work on the building for which he was entitled under his contract to receive less than $7,114 (pp. 157, 161, 205).

What he did was what might be expected. He immediately began to make unreasonable, exorbitant and unjust demands on the defendant (pp. 154-157, 166-167, 391-396, 402), first as to payments on account of work done, as alleged, not at the measure or under the terms of the contract, but what the work had cost and what in equity he was entitled to, including his losses and expenses (pp. 103, 106, 166-167, 402), and finally what the defendant was getting from the United States Government (pp. 393-395, 402); second, plaintiff began to complain about the delays he had suffered (pp. 394, 402) and the expense he had been put to (pp. 106, 402), as if the defendant were in any way chargeable with them. Mr. Guerini had made a good thing out of Mr. Converse, had received extraordinary wages, his transportation and expenses (pp. 125-126, 165, 127), and had put the job into a hole out of which it could never be rescued.

The stopping of the work on March 9, 1912, seemed to afford plaintiff a means to escape, and he tried hard to embrace it (pp. 383-385, 250).

The plaintiff waived any rights to terminate its contract from March 9, 1912, to April 25, 1912, within which period the defendant ordered and directed plaintiff to proceed with its work.

The intent of the parties following the suspension of the Government on March 9 or 10, 1912, is clearly expressed and set forth in their correspondence, and the plaintiff was estopped from terminating its contract by the position assumed and the declarations made by it.

POINT IV.

The cost to plaintiff of setting the granite is included in the verdict of the jury, and cannot be separated from the concrete work, though the granite setting was not included in the original contract, nor was it a part of the contract rescinded or terminated May 22, 1912. The verdict should be set aside.

(REFERENCES ARE TO MARGINAL PAGES.)

The contract was

> "to furnish and set in position, including the concrete backing, all the imitation sandstone, and to construct all the interior concrete walls, concrete floors, concrete roof, backing the granite construction and enclosing all the I-beams,"

or, in brief, all imitation sandstone and concrete above foundations (p. 12).

There were some options, including one to *"set in position all the granite walls* * * * and all other granite work for the sum of 40 cents a square foot surface," at the option of defendant (pp. 20-21). This option was exercised September 15, 1911 (pp. 67, 401-402, 434-435), and accepted and acted upon by the plaintiffs and bills rendered and paid at the contract rate (pp. 150, 157, 164, 390, 394-395) and at an anticipated profit (pp. 150, 182). The granite setting ceased about January 12 or February 12, 1911 (pp. 39, 68), by mutual agreement of the parties, and the contract for setting granite terminated. The work had not been completed or finished (p. 334) and was not satisfactory to defendant, the general contractor (p. 294).

The work being separable, the quantities determinate, the price agreed upon and the work completed before any trouble had arisen, or any rescission or termination suggested (p. 284), the granite setting formed no part of the contract that the plaintiff attempted to repudiate, rescind and terminate on May 22, 1912.

It was no part of the original contract, but became a part of the contract September 16, 1911, and was then excluded and eliminated February 12, 1912, by mutual agreement, say Follett and Converse (pp. 39, 68, 127). The rights of the parties were therefore vested and fixed and it was no longer any part of the contract between the parties. Being no part of the contract May 22, 1912, it could not be subject to the notice of revocation of that date.

However, the Trial Court has admitted evidence of *the cost and expense attending the setting of this granite* over the repeated objection of the defendant that evidence of the cost and expense attending the setting of this granite was not the

proper measure of recovery of damages in the case and no proper charge against the defendant (pp. 112-129, 199, 194-195; Assignments of Error Nos. 66, 61, 68, 78, 75—no separation).

The measure of recovery for the completed granite setting is 40 cents per square foot, the contract price, but that is not what the plaintiff has recovered, but a sum greatly in excess of the contract price for setting granite. It could not be otherwise in view of the delays and manner of directing the work.

The plaintiff has recovered the actual cost of all his disbursements, including those made on account of this granite setting. The cost of the concrete has not been, and from the testimony and exhibits cannot be, separated from the cost of the granite setting. The verdict is therefore based upon a wrongful charge to the jury (p. 374), to which defendant duly excepted (pp. 379, 359, 356, 377, 374).

POINT V.

The verdict is excessive, for it includes items of expense not chargeable to defendant and does not credit defendant with charges against plaintiff fully proven and admitted by plaintiff.

The plaintiff in its account shows a credit, so-called (p. 200), of:

One shed,	$ 65.00	
Custom work by Guerini,	778.50	
Lumber sold,	243.01	
Cash payment (fol. 319),	3,765.50	
Cash payment (fol. 319),	674.05	$5,526.06

A Shed.—The shed had been purchased and paid for by defendants (p. 200), in the lumber and hardware included in the verdict.

Operating Derricks.—It was proven and not contradicted by any evidence, oral or written, to the contrary (pp. 233, 444), that defendant furnished to plaintiff a second derrick engine, an operative and oil, etc., at plaintiff's request (p. 233), and actually paid for the same the sum of $541.22 (p. 275). This certainly should have been included in the credits. The charge was admitted (pp. 434, 444, 21).

Re-enforcement of Piers.—The plaintiff in doing its work omitted the re-enforcement in piers (pp. 45-46, 243-246, 261-262, 425), which were billed by plaintiff to defendant at $300 (p. 193). This expense was incurred solely by the carelessness of Guerini and Follett, the plaintiff's representatives. The piers were torn down and rebuilt by plaintiff and the expense thereof has gone into plaintiff's verdict against defendant.

This re-enforcement was required by the specifications (p. 425), and by the plans (p. 245), copies of which plaintiff had from the beginning (pp. 245, 438).

It was the office and duty of the Court to interpret the contract and to instruct the jury as to its meaning and as to whether the contract, specifications and plans required the plaintiff to place the re-enforcement, and as to the cost of $300 to plaintiff, and the cost to defendant to take down the steel (p. 246), and the delay to the work incident to tearing down and rebuilding said piers (pp. 245-246; Assignment of Errors 3 and 4, p. 471).

Credit for these sums of $65, $541.22 and of $300 and the additional expense to defendants to remove their steel, should have been given to defendants, and the judgment is excessive in the amounts thereof.

Plant and Preparations.—Follett says he bought lumber, built an office and storeroom (pp. 37, 63, 77). He says he spent $3,762.69 for *lumber, hardware* and *material*, but the record does not disclose what the materials were (p. 196); that he spent $189.49 for *iron and steel and labor on same;* that he spent for *equipment* used on building $175.25; and he bought *things* which were used on the building, $106.47, and that he bought *materials* for which he paid $2,616.06 (p. 196).

What these materials, things, equipment and iron and steel were, or what part of the building they were used upon, or were reasonably necessary for, *is not disclosed* and cannot be *described.*

The plaintiff was not to furnish a particle of lumber, hardware, equipment, iron or steel for the permanent structure known as the Federal Building, and there can be no pretense that any was furnished by the plaintiff. These materials, things, iron and steel, hardware and equipment were solely for the preliminary preparations described by witness Follett (pp. 195-196, 201-202, 77), in preparation for, or doing the concrete work on the Federal Building, if indeed they had anything whatever to do with the contract work between the parties.

Taking the view most favorable to the plaintiff's case, that the largest item of $2,616.06 was for lumber at $30 per M. (pp. 109, 149), it would purchase 87 M. feet B. M. of lumber, which may have been used for shops, cement sheds and storerooms, scaf-

folding and runways (pp. 196, 201-202), and which is included in the verdict of the jury (pp. 29, 32-33).

Then this lumber is charged to the defendant in the $3,500, as cement storage sheds (pp. 63, 77, 202-203), runways, etc. (pp. 205-206, 398, 440). They had also sold one building erected by them to defendant for $65 (p. 200). They credit defendant $[illegible], but it may have cost in the charges made and collected in the jury's verdict ten times $65.

Wages Not Chargeable to Defendant.—However, all work on the Federal Building ended March 9, 1912, and May 22, 1912, the contract was annulled and rescinded by the plaintiff. Certainly none of Follett's wages could be charged to defendant after May 22, 1912, per the instruction of the Trial Court (pp. 370, 378), which would reduce the plaintiff's recovery by a still further sum of one and one-quarter months at $140, or $175.

The jury undoubtedly allowed in its verdict the full amount claimed for Follett's wages, $2,080 (p. 198), as evidenced by their verdict of $35,873.09 (pp. 380-382), when compared with the aggregate of Follett's and Converse's figures, viz.:

Follett's Disbursements at San Juan (pp. 195-199):

pp.			
196	Lumber,	$2,616.06	
	Iron and steel,	189.49	
	Materials,	672.42	
196	Equipment,	175.25	
196	Things,	106.47	
	Stone,	1,960.87	
197	Motors, etc.,	433.25	
197	Cement, etc.,	2,843.05	
	Oil,	19.20	
	Freight and expenses,	123.06	
197	Miscellaneous,	306.69	
198	Passenger fares,	830.00	
	Ice, medicines, etc.,	416.59	
198	Sand,	407.96	
	Board and room,	678.40	
198	Wages,	2,080.00	
199	Wages,	11,379.21	
		$25,239.97	$25,303.22
199	(Given at $25,303.22)		

Converse's statement of disbursements:

pp.			
202	Machinery, tools & plant,	$3,500.00	
125	Freight bills, Boston, etc.,	1,117.23	
126	Pay rolls, Boston,	2,794.56	
121	Invoices, etc.,	1,135.14	
114	Converse's services,	1,750.00	
113	Rentals, plant & machinery	5,805.00	
111	Profits,	9,738.00	$25,839.93
		$51,079.89	$51,143.15
200	Credit,	5,526.06	5,526.06
		$45,553.83	$45,617.09

	Record (p. 203),	$45,617.09
111	Deduct prospective profit,	9,738.00
382	Verdict, $35,873.09	$35,879.09

(See bill of particulars, p. 29.)

A study of this account discloses some interesting things, especially when compared with the plaintiff's bill of particulars (p. 29).

Concrete Plant.—It shows that the plaintiff has charged and recovered from the defendant the full value of a concreting plant $3,500, for the use of which plaintiff has charged and collected $5,805 rental for less than 208 days, during which period the plant could not have been used more than 120 days (October 16-March 9, 1912, 144 days, less 24 holidays). The defendant has not only been stung with nearly or more than twice the value of the plant in rentals (pp. 202, 205, 398, 440), but for a plant whose rental was offered by plaintiff to defendant March 29, 1912, for $8.50 per day, although they have recovered in the verdict $15 per day for only a part of the same plant (p. 113), and on May 31, 1912, offered it at a purchase price of $2,334 (p. 440).

Superintendence, Per Cent. of Labor.—To produce this concrete and get ready to mould some concrete decorations, the plaintiff claims to have disbursed:

pp.		
199	For labor,	$11,379.21
	(At $12 per day for Guerini)	
198	Steamship passage,	$830.00
	Medical services, ice and comforts,	416.59

	Follett, services,	2,080.00	
	Follett, board and room	678.40	
	Converse, services, 70 days at $25.00,	1,750.00	
	Lootz, services,	336.56	
	and transp. & exps.,	75.00	$6,166.55
126	Guerini, services, 52 2/3 weeks at $72.00,	$3,792.00	
126	Guerini, Feb. 3-9, 1911,	509.00	4,301.00
			$10,467.55

Guerini, at $12 per day.
Lootz, at $41.15 per day (pp. 169-170).
Converse, at $25 per day.
Follett, at $6 per day (p. 165).

In other words, plaintiff has recovered $10,467.55 to superintend laborers whose wages were	$11,379.21	
Less Guerini's wages paid at San Juan, P. R.,	3,792.00	
	$7,587.21	$7,587.21

The superintendence alone is 138 per cent. of the labor, which labor includes the wages of the foremen carpenter and mason, who were *quasi* superintendents.

Mr. Guerini was the practical superintendent (pp. 230, 234, 237) and Mr. Follett was there to conduct the correspondence (pp. 62-64) and to watch or steer Mr. Guerini (pp. 62-63, 237), until later, when both men attempted to boss the work (pp. 238, 449, 453), trouble arose and a Mr. Lootz, a civil engineer (pp. 57-60, 170-171, 405, 443, 455), and a boss carpenter, Mr. Russell (pp. 239-240, 443,

452, 453), were sent to San Juan to straighten out the trouble and the work (pp. 239-240, 242, 403).

Mr. Lootz *was ill* practically all the time he was in San Juan (p. 239) and remained only ten days (pp. 75-76, 170-171). Mr. Russell remained only about two months (p. 240). Mr. Lootz was sent to San Juan about December 29, 1911, to take charge of the work, all communications to be addressed to him (p. 171).

Plaintiff's Standard of Fair and Reasonable.—Mr. Converse, who is at present the Guerini Stone Company, said he considered it fair and reasonable to charge defendant with $336.56 (p. 127), his expenses, etc., for ten days' services of a sick man, because he says "they brought the situation on themselves," without explaining *who* they were or *what situation* had been created (p. 170). This shows Mr. Converse's idea of what is fair and reasonable, and the same standard was no doubt applied to the other disbursements testified to by him (pp. 121-127). The same standard of what Mr. Converse considered fair and reasonable was that expressed by him that he wanted a superintendent (Follett), at $140 per month, in charge over Mr. Guerini (the vice-president of his company), at $12 per day (pp. 127-128), and two laborers, and that he did not think that was expensive conduct of the job (p. 165).

Unit Price for Concrete.—It was further shown and expressed when he demanded in his application $1.07 a cubic foot (or $28.89 per cubic yard) for concrete in the basement walls of the building (pp. 146-147, 95, 166-167), which was exactly similar in character and cost as that placed by defendant (pp. 323-326, 147, 145-148), and which plaintiff had agreed in its contract to furnish and place at $6.70 per cubic yard (pp. 20, 291-292, 323-326), and

which Mr. Converse had figured and declared could be furnished and placed for $15.75 per cubic yard (pp. 108-111, 148-150, 151), and on which price he figured his profits of $9,738 (p. 111)

To bolster up his case and meet the criticism of the United States Supreme Court in its opinion that no unit price was stated for monthly payments (p. 157), Mr. Converse swore that plaintiff's J. P. Carlin had promised and agreed (which Carlin denied, pp. 290-291, 328-329) to make monthly payments for the cheapest concrete in plaintiff's job at $1.07 per cubic foot (pp. 151-154, *contra*, pp. 290-291, 328-329), when at that rate he would be receiving $95,308 (89,046 cubic feet times $1.07, pp. 153, 164) for work which he was to do and complete at a contract price of $64,750 (pp. 18, 153-157).

Contract Terms.—His sense of contract obligations under a written contract is exhibited when he says that $1.07 per cubic foot for concrete "was not in excess of our contract, if you take the expense which Mr. Carlin had caused us during that ten or eleven months (February to October 13, pp. 67-68, 77, 93) *hanging around here*" (p. 166), which is very significant and bears out defendant's contention that plaintiff's men were loitering, loafing and "hanging around" at San Juan at high salaries and doing nothing, at an expense of upwards of $18,169.76, which is included in the judgment against defendant *improperly* (pp. 126-127, 198-199).

In respect to this very thing Mr. Converse says Mr. Guerini "couldn't handle any work for us alone; we wouldn't have him" (p. 166). Yet he did have him at San Juan fooling away his own time and one or two others from early February, 1911, to October 13, 1911, with practically nothing

to show for it, or, as Mr. Converse expresses it, *"ten or eleven months hanging around here"* (p. 166).

Nothing Done.—That nothing was done or accomplished is evident from the fact that plaintiff made no application for payments to the defendant until December 30, 1911 (p. 158), eleven months after Guerini and ten months after Follett went to San Juan (pp. 63, 96, 142, 389-390), and then only in the total amount of $5,654 (pp. 158, 390). That was for all the work that had been done (p. 86). Certainly that was the plaintiff's own estimate of what it was entitled to under its contract, and it certainly did show "ten or eleven months' hanging around" on the part of the plaintiff, but on its own volition and by its own program.

The date or time for commencing the work was stated and fixed as September 15, 1911, at the request (pp. 159-161, 181; Exhibit 26, p. 401) and with the acquiescence and approval of defendant (pp. 181, 159-161; Exhibits I, J, 26, 8 and 9), and so that plaintiff would know when the contract period of 300 days expired.

Up to September 15 no differences or unhappiness had arisen between the parties and no suggestion or intimation that plaintiff was going to throw down or give up its contract (pp. 284, 143); August 17, 1911, plaintiff made a proposal to defendant to do about $35,760 worth of steel and other work (Exhibit K, p. 435). Plaintiff's president insists that the concrete work could have been done in 200 days (pp. 180-181).

On or about September 15, 1911, plaintiff likewise acquiesced in the election under the contract by defendant to have plaintiff set the granite for the Federal Building (pp. 162-163), and plaintiff

undertook the work fully cognizant of the conditions that existed at the building at San Juan (pp. 93-94, 146-147, 162-163). This granite setting was undertaken by the plaintiff without a murmur of discontent or any intimation of dissatisfaction or any complaint of delay.

On October 21, 1911, the first word about delay or that plaintiff has been "unable to proceed with our work" was said, and this was only to safeguard plaintiff in its time limit (Exhibit 18, p. 387, and Exhibit W, p. 444). The defendant was the one who had cause for complaint, and they were made (Exhibits M, p. 437; N, p. 438; DD, p. 449; EE and FF, p. 450; HH, p. 453; LL, p. 456). The plaintiff replied with explanations and excuses and some counter-complaints about the receipt of granite and of reinforcement steel (Exhibits 18, p. 393; 27, p. 402; Y, p. 446).

POINT VI.

No profits could have been realized under the contract. The contract was unprofitable and of no value to plaintiff.

If the testimony of plaintiff's president and local agent (pp. 112-127, 165-166, 169-171, 174, 193-202) is believable or believed, plaintiff spent on account of work at San Juan $41,405. This was all on account of setting granite and concrete and making about thirty simple moulds (p. 257) for concrete and $3,500 worth of tools and machinery (pp. 114, 202-203), and the profits or value of the contract may be easily determined to be *nil.*

The plaintiff set 3,460 square feet (p. 395) of granite at $.40		$ 1,384.00
at which price Mr. Converse says he expected to make a profit (p. 182).		
This sum for setting granite..	$1,384.00	
and the value of machinery and tools	3,500.00	4,884.00
subtracted from the expenditures		41,405.00
leaves		$36,521.00

which would be the cost of the concrete

This was not so, as can be proven by plaintiff's testimony. In fact, it would not be fair to charge it all to the concrete, for the granite setting was most extravagantly conducted.

Nothing was done but the setting of granite and placing of sub-basement concrete from September 15, 1911, to March 9, 1912 (pp. 79, 147, 342-343). Before that no stone, sand or cement had been used (pp. 77, 38). The cement is mixed up with the plaster of paris and cannot be separated, but the amount of cement is easily determined from the cubic yards of concrete. The lumber is in the same category, but what was used for forms is determinable approximately. Taking these and the items that must have been disbursed solely on account of the granite setting and placing of concrete, we have the following:

From September 15 to March 9 is 175 days, or 25 weeks, or 5 4/5 months.

Rental for machinery was charged by plaintiff to H. P. Converse & Company (fols. 339-340) at $15 per day.

175 days at $15		$ 2,625.00
Wages:		
Guerini, 153 days at $12 (p. 127)	$ 1,836.00	
Follett, Board at $60 (p. 165)	340.00	
Follett, wages at $20 (p. 165)	500.00	
Converse, wages at $25 (pp. 114, 29)	750.00	
Russell, wages at $10 (December 24 to March 9, 75 days) (p. 127)	750.00	
Lootz, wages, 10 days (p. 127)	336.56	
Stone masons' wages (2) 75 days at $10 (November 24 to March 9) (pp. 126, 452)	750.00	5,262.56
Transportation (p. 125):		
November 17 to March 7, 1912 (Converse)	$ 659.00	
San Juan, Follett (p. 198)	830.00	
Men's expenses (p. 198)	416.59	1,905.59
		$ 9,793.15
Concrete Materials and Labor:		
Crushed stone (pp. 29, 196)	$ 1,960.87	
Sand (pp. 29, 198)	407.96	
Cement, 660 cubic yards concrete, 1½ barrels, at $1.83 (p. 108)	1,811.70	

Lumber for forms, 660 cubic yards at $5.40 (p. 109)	594.00	
Labor to mix and place 660 cubic yards at $2.50 (p. 109)	1,650.00	6,424.53
Ornamental concrete, setting only (p. 110)		546.00
		$16,763.68
For this concrete and granite setting plaintiff could at most received (p. 153)		
660 cubic yards at $18.50	$12,110.00	
3,460 square feet at $.40	1,384.00	13,494.00
showing a loss to plaintiff on its work done September 15 to March 9 of		$ 3,269.68

This includes no expense for preparation.

The work done was the rough concrete in the basement, the cheapest of all the concrete (pp. 304-305, 324, 342), and it was not completed (p. 334). The value of the concrete in the basement, which was done by plaintiff, was about one-third of the value of that above the first floor (pp. 304-305, 342-343). The Government estimated it at 35 cents and $1.07 respectively (pp. 342-343).

The above cost as deduced contains no coal for hoisting, no watchmen, no casualty or compensation insurance, no premium on bonds, no overhead charges, as office., etc., bookkeeping, etc.

It contains no cost of preparation to do the work, no modelling by Guerini, no salaries and expenses January to September 15, 1911; nothing but the

current expenses September 15 to March 9, while the work was being done.

In preparation alone plaintiff has charged and recovered:

1911:		
January and February, cash at Boston, Guerini		$ 509.00
Guerini, wages at $12, February to September, 227 days		2,734.00
Follett, wages, 7 months at $140		980.00
2 men, 7 months at $150		1,050.00
Lumber, $2,616.06-$594 (p. 196 and *supra, forms*)		2,022.06
Equipment:		
Sproul	$674.42	
Portilla	189.49	
Korber	175.25	
Abarca	106.47	
Power and light	433.25	
Freight, etc.	123.06	1,701.94
Labor:		
Inseparable (stated in aggregate at $11,379 (p. 199)		
An aggregate of		$ 8,997.00
for which nothing was recoverable under the contract except some forms, the cost of which was estimated by Mr. Converse at $523 (pp. 110, 150-151), not one-third of Guerini's wages		523.00
making an initial expense of		$ 8,474.00

The *unreasonableness of such an expense is apparent.*

Not a thing to show for all this money, $8,474, except some moulds of the reasonable value of $523. Did Mr. Guerini and Mr. Follett milk Mr. Converse's pocketbook?

Plaintiff has offered the testimony of its officer and agent to show disbursements at San Juan aggregating (pp. 29, 33, 111, 203)		$41,405.15
and have recovered a verdict of	$35,873.09	
with interest	8,609.54	44,482.63
credit having been given for payments, etc. (p. 200)		5,526.06
		$35,879.09
If the amount was spent on account of Government Post Office and Court House		$41,405.15
it contains machinery, materials and tools (pp. 202, 206, 114)		3,500.00
Expended cash		$37,905.15
For work done the plaintiff might have received at most $18.50 per cubic yard for the cheapest work		12,110.00
showing a deficit of		$25,795.15
This from the contract price		64,750.00
leaves to complete the work		$38,954.85

The total amount of the concrete was (pp. 161, 288) cubic yards	3,298	
Plaintiff had placed (p. 204) cubic yards	660	
It had to place cubic yards of the floors and artificial sandstone front and ornamental work.	2,638	
Even at Mr. Converse's ridiculous price (pp. 110-111) of $15.75, this would cost plaintiff		$41,548.00
showing a loss of		$ 2,593.15
to complete the work.		
Plaintiff lost on what concrete and granite it placed more than		3,269.68
showing a total loss of at least		$ 6,862.83

ARGUMENT, LAW POINTS.

LAW POINT I.

There was no breach by defendant that warranted or justified a rescission or termination by plaintiff.

> "Before any performance, the law requires a literal performance. After part performance, the law demands only a substantial performance. After the contractor or owner has in good faith made preparation to carry out the contract and has entered into the undertaking, the breach must go to the essence or substance of the contract in order to relieve the other party from his obligation to perform his part.
>
> This rule is based upon the ground that a benefit has been conferred upon the party who seeks to take advantage of the breach, and it is not equitable for him to take advantage of another's misfortune."
>
> *See cases post.*

The breach of a contract which has been partly performed that will warrant a rescission by either party must go to the essence of the whole contract to warrant a rescission by the other party. The breach must be a practical repudiation of the contract, or some act that prevents the other party from performing and completing his work, or an unqualified declaration by the party charged with the breach of his intention not to proceed or perform his part of the contract.

St. Regis Paper Co. v. *Santa C. Lumb. Co.*, 186 N. Y., 89.
Langdell's Summary of Contracts, Sections 160-167.

As to Delays.—Mere delay in absence of abandonment of performance is not such a breach as will authorize the other party to terminate the contract, especially where a measure of damages for delay is provided in the contract.

Cody v. *City of N. Y.*, 71 N. Y. App. Div., 54, 57, 58, 59, 60, 61.
Schultz v. *Farrell*, 142 N. Y. App. Div., 13.
Cornell v. *Standard Oil Co.*, 91 N. Y. App. Div., 345.
U. S. Life Ins. Co. v. *Oswego Co.*, 57 Hun (N. Y.), 204, 213.

Mere delay in the performance of some of many things which defendant is required by its contract to do will not entitle or justify plaintiff in rescinding its contract.

Luce v. *New Orange I. Assn.*, 68 N. J. L., 31.

To justify a rescission the plaintiff must show such wilful and intentional delay as will evince the intention of the party delaying the work to treat the contract at an end.

Reid v. *Mix*, 63 Kans., 745.

The cases that permit a plaintiff to rescind its contract and to recover its expenditures, as has been permitted in this case, are one and all cases where the owner has repudiated the contract.

Peck-Hammond Co. v. *Heifner,* 33 So. Rep., 807.
Vickers v. *Electrozone Co.,* 67 N. J. L., 665;

or prevented performance of the contract.

Under a contract to advance moneys as requested during the progress of work, the fact that the advances were $12,500 less than $37,000 incurred was held not to show an intentional default sufficient to warrant plaintiff in rescinding the contract.

St. Regis Paper Co. v. *Santa Clara Lumber Co.,* 186 N. Y., 89.

There is no evidence of any such situation, acts or declarations in this case before the Court. Nothing that would justify a termination or rescission of the contract by plaintiff (*supra*).

LAW POINT II.

Eminent authorities on the law of contracts agree that failure on the part of the defendant to perform in the manner and at the time required does not go to the essence of the contract.

The right "to make restitution and maintain an action to recover money paid under a contract presupposes a right to treat the contract as if it had been rescinded. But it is not every breach of contract that will entitle one to treat a contract as rescinded and sue as on a failure of consideration. The breach must be a breach so materially affect-

ing the essence of the contract as to be an equivalent to a repudiation thereof."

Keener on Quasi-contracts, 303, and cases cited.

The plaintiff will "not be allowed to recover in an action more indemnity than the loss caused by the defendant's breach of contract." The measure of recovery should be the damage suffered by the plaintiff because of the defendant's breach of contract. The plaintiff, who has received the benefit under the contract, cannot recover from the defendant as if there had been an entire failure of consideration; such a recovery would be inequitable. Unless the failure of consideration is total or is apportioned by contract, the plaintiff's claim is not for restitution, but to recover damages.

Keener's Quasi-contracts, 305.

The law of breaches of contract and of damages resulting therefrom, as presented by the defendant-appellant or plaintiff-in-error in this case, is not novel, but is the fundamental law of contracts. Years ago, when counsel was a student in the Harvard Law School, the eminent Professor Langdell was teaching the same principles and discriminations and had embodied them in his wonderful summary supplemental to his Cases on Contracts (Secs. 160, 161, 164, 165, 167).

LAW POINT III.

Defendant's alleged failure to pay monthly installments earned, even if true, did not warrant plaintiff in terminating or rescinding its contract.

A default in the payment of an installment or of progress payments, if not coupled with facts showing an intent on the part of the party in default to renounce his liability under the contract, does not operate as a discharge of the adverse party.

Mersey Co. v. *Naylor,* 9 App. Cas., 434; affg. 9 Q. B. D., 648,

cited with approval in

Norrington v. *Wright,* 115 U. S., 188, 210.
Freeth v. *Burr,* L. R., 9 C. P., 208.
Winchester v. *Newton* (Mass.), 2 Allen, 492,

cited with approval in

Roper v. *Johnson,* L. R., 8 C. P., 167.
Wharton v. *Winch,* 140 N. Y., 287.
Campbell v. *McLeod,* 24 N. S., 66.
Cox v. *McLaughlin,* 54 Cal., 605.
Keeler v. *Clifford,* 165 Ill., 544.
Palmer v. *Ry.,* 18 Ill., 217.
Osgood v. *Bauder,* 75 Ia., 550.
West v. *Bechtel,* 125 Mich., 114.
Beatty v. *Lumber Co.,* 77 Minn., 272.
Bethel v. *Improvement Co.,* 93 Va., 354.
National Cont. Co. v. *Hudson R. W. P. Co.,* 110 App. Div., 133.

Brown v. *Rasin M. Co.*, 98 Md., 1.
Beatty v. *Howe L. Co.*, 77 Minn., 272.
O'Dwyer v. *Smith*, 38 Misc. Rep., 136.
Jones v. *City*, 60 App. Div., 622; affd., 171 N. Y., 628.
Curnan v. *Del. & O. R.*, 138 N. Y., 480.

The case of *Canal Co.* v. *Gordon*, 6 Wall., 561 (1867), is the earliest case in the United States Supreme Court on the effect of failure to pay money and is clearly distinguishable from the case at bar. In that case a contractor, who was to build a canal, commenced work in the spring of 1853 with an exceedingly large force of men, progressed rapidly with it, and did $84,000 of work up to June 1, 1853. At that time it had only been paid $6,000, and on June 7, 1853, the Canal Company was unable and would be unable to pay the estimate of the engineer then due, and was unable to progress with the work, being without money and without credit, and the Canal Company had refused to pay the amount certified according to the contract.

Under these circumstances the contractors threw up their work, because the circumstances showed an absolute renunciation, refusal and inability to perform the contract; further, there was not a mere delay in making progress payments, but an absolute failure to so pay and to ever be able to carry out the contract. The full facts and the exact opinion of the Court are set out in 18 U. S. Supr. Ct. Rep. (Law Ed.), 894.

The points of law deemed to have been decided by the Court, as set forth, giving the exact opinion of the Court, do not include any point such as is only set forth in the *headnote* (3) in 6 Wallace, 561. The opinion and facts of the case do not support the *headnote*.

The case of *Phillips Constn. Co.* v. *Seymour,* 91 U. S., 646, does not support any rule that mere delay in making a progress payment is a ground for terminating the contract. The *headnote* (4) is wrong as applied to the facts of the case.

The contractor, who was to build a railroad, started work in July with 1,000 men and suitable teams and equipment along the whole line of the work. The estimates of work by the engineer for October and November were not paid, and the contractor had performed $107,000 of work up to December 15th, which he had not been paid for. Then he terminated the contract, but on being informed that the defendants could not pay for the work already done and would be unable for an indefinite time to pay further monthly installments. As to this the jury found:

> "That defendant at the time plaintiffs stopped work had given plaintiffs to understand that the defendant was financially unable to pay the estimates for work then due, and would probably be unable for a time to pay future monthly installments."

Thus, here was a renunciation and refusal and a total inability to pay, not one, but a number of previous installments, and those to come for some indefinite time in the future.

In *Norrington* v. *Wright,* 115 U. S., 188, where there had been a failure to deliver installments of *goods,* the Supreme Court cited and relied upon *Mersey Co.* v. *Naylor, post,* but held it was distinguishable from the case at bar on the ground that while failure to make partial payments when due was not of itself a breach of the entire contract, *failure to deliver* installments of goods was. The Supreme Court said:

"The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in *Mersey Co.* v. *Naylor,* 9 App. Cas., 434, affirming the judgment of the Court of Appeals in 9 Q. B. D., 648, and following the decision of the Court of Common Pleas in *Freeth* v. *Burr,* L. R., 9 C. P., 208.

"But the point there decided was that the failure of the buyer to pay for the first instalment of goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the House of Lords, are applicable only to the case of a *failure of the buyer to pay for,* and not to that of a *failure of the seller to deliver,* the first instalment."

Then the Court, per Gray, *J.,* continued and quoted with approval from the case, as follows:

"The Lord Chancellor said, 'The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract as to the time of delivery—"delivery, 1,000 tons monthly commencing January next"—and as to the time of payment, "Payment net cash within three days after receipt of shipping documents"; but that does not split the con-

> tract into as many contracts as there are deliveries for the purpose of so many distinct quantities of iron. It is consistent with the natural meaning of the contract that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is to be made. *It is perfectly clear* that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfillment of the unfulfilled part of the contract by the delivery of the undelivered steel.' 9 App. Cas., 439."

The Supreme Court also said that there was a different rule as to failure to make partial payments, for it likewise distinguished the case of *Winchester* v. *Newton*, 2 Allen, 492, from the case of *Norrington* v. *Wright*, on the ground that it was like *Mersey Co.* v. *Naylor, post*, and a different rule was applicable to failure to make partial payments.

The rule as laid down in *Winchester* v. *Newton* (Mass.), 2 Allen, 492, cited with approval by the Supreme Court as to the effect of failure to make partial payments, is stated in that case in the following terms:

> "The defendant contends that the refusal of the plaintiff to pay for the lumber which was delivered previously to the first of April, 1858, and which has been the subject of the former action by the present defendant

against the present plaintiff, excused him from delivering the remainder of the timber, and constitutes a good defense to this suit. The legal principle which the defendant would apply to this case may be entirely correct when properly applied. It might be held in a case where the vendor had contracted with the vendee to deliver a certain amount of timber or other commodity to be delivered at certain *specified* times, and payment was to be made therefor on each delivery, and the vendee had made an *unqualified refusal to pay anything more—not merely an omission to pay for a particular delivery, but in language broad enough to be treated as a general refusal to make further payments*—that such a refusal to make payment discharged the other party from liability to damages for neglecting to make further delivery as stipulated in the contract."

In *Mersey* v. *Naylor*, 9 App. Cas., 434, 438, the House of Lords establishes and fixes the rule in England that the failure to make a partial payment does not constitute a breach of the contract. The Court, per Lord Selborne, said:

"I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr*, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the

> contract, such as would amount to a rescission, if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part, and I think that nothing more is necessary in the present case than to look at the conduct of the parties and see whether anything of that kind has taken place here."

In that case there was a letter, like the one at bar, of May 22, 1912, from the plaintiff. Lord Selborne said of it (p. 441):

> "They added, 'We shall therefore consider your refusal to pay for the goods already delivered as a breach of contract on your part and as relieving us from any further obligations on our part.' I think they were wrong in that conclusion, and that there is no principle deductible from any of the authorities which supports the view of such—I hardly like to call it *a refusal*—of such a demur, such a delay or postponement under those circumstances."

In the case at bar, the provisions for progress payments are strictly limited to *the lump sum contract price,* a definite sum of money. No provisions are made for the granite work or for any unit prices.

LAW POINT IV.

Payments were conditioned upon the work being done to the satisfaction of the architect and the defendant.

The contract between the parties makes payment a condition precedent to the plaintiff's doing the work under the direction and to the satisfaction of the Government architect and the general contractor (pp. 12, 21). The contract says:

> "The general contractors hereby promise and agree * * * to employ and do hereby employ him to provide the materials and to do the said work, according to the terms and conditions herein contained and referred to, for the price aforesaid, and hereby contract to pay the same *at the time, in the manner and upon the conditions above set forth*" (p. 21).

Here was a condition precedent to the plaintiff's recovering anything under the contract. It was a condition precedent to any right of the plaintiff to demand payments, monthly or otherwise, from the defendant. The Trial Court in its charge said:

> "The plaintiff must show and prove that the work was performed to the reasonable satisfaction of the defendant and the architect before it is entitled to payments on account" (p. 377).

There is not one particle of proof in the case that the satisfaction of the architect or his representatives or the defendant was sought or obtained, nor is there any evidence in the case that

the work was done according to the specifications or was done per the directions of the representatives of the supervising architect and the defendant. The proof is all to the contrary.

The Trial Court greatly weakened the charge above set forth by instructing the jury:

> "The payment provided for is 85% of the work put into the building, but it is *to be to the satisfaction* of the general contractor. I charge you that that is to be reasonably construed. It does not mean that Carlin or the defendant company can just say, I will not approve this voucher, if it is shown that there was 85% done, or whatever is shown to have been done to the extent of 85% the Carlins are bound to pay monthly, provided the proper voucher has been furnished. It is for you to say whether there is such proof in the case. But the satisfaction of the Carlin Co. is *to be a reasonable satisfaction*" (pp. 371-372).

There being no evidence of satisfaction in the case, it was the duty of the Court to so instruct the jury, and to determine that the plaintiff was not entitled to payments.

LAW POINT V.

There was no supplemental contract of February 2, 1912, as to progress payments or unit prices; such a contract as was attempted to be proven was an invention and an afterthought.

Not thought of April 25, 1912 (Exhibit 24).

Converse testified he only wanted what his contract gave him (pp. 166-167).

Price of $1.07 would give him vastly more than contract price (pp. 153, 188, 291).

Knew it was error corrected by Government representative (pp. 154-157).

Agreement and conversation denied flatly by J. P. Carlin (pp. 290-291).

Price of $1.07 was for cheapest work (pp. 150-153, 153-159, 342-343-344).

Converse not honest in maintaining upper work was as cheap as lower work (pp. 152, 157-159, 177-180, 188, etc.).

No consideration for a change in contract.

LAW POINT VI.

Whether or not the alleged delay by defendant was reasonable was a question of law for the Trial Court.

The question whether *the delay* from March 9 to May 22, under circumstances and conditions not disputed and where the motive of the parties is clearly expressed in writing, *was reasonable* was purely a question of law for the Trial Court, and

the Court should have determined it, which would have determined the result in favor of defendant.

Sullivan v. *Cement Co.*, 119 N. Y., 348, 355, and cases cited.

It was for the Court and not the jury.

North v. *Mallory*, 94 Md., 305 (1902).
May v. *Crawford*, 150 Mo., 699, 700 (1899), and cases cited.

No facts were in dispute during this period, but the situation of the parties is admitted and is the subject of correspondence.

Plaintiff never offered to proceed with its work or expressed a willingness to proceed with it, which was essential.

Sullivan v. *N. Y. & A. C. Co.*, 119 N. Y., 348.

No offer to restore was ever made by the plaintiff.

"The construction and interpretation of written instruments is a question of law for the Court."

7 *Ency. U. S. Sup. Ct. Reports*, 259, and cases cited.

"It is a fundamental rule in the construction of contracts, if the language is doubtful, the Courts in ascertaining the meaning of the parties, especially as to the subject-matter, should look not only at the language employed, but to the subject-matter, the conduct and the situation of the parties, as between themselves and with relation to the

subject-matter and the surrounding facts and circumstances, and may avail themselves of the same light which the parties possessed when the contract was made."

Ency. of U. S. Sup. Ct. Reports, Vol IV, "Contracts; Intention of Parties; How Ascertained," p. 570, citing numerous U. S. Sup. Ct. decisions.

"When a contract was entered into on the 29th day of November, and more than two months had elapsed when the defendants were confronted with the demand that the plaintiff should be permitted to tear out his engine and replace it with another. Was such a demand reasonable at that point? Whether it would so delay the completion of the work as to make the time when the work could be completed so unreasonable as to authorize a rescission of the contract, was a matter of law for the Court and not a matter of fact for the jury."

Ragon v. *Garther*, 11 Gill & J., 490.

North v. *Mallory*, 94 Md., 305 (1902).

Whether damages for the breach of the contract are within the scope of the risk undertaken is a question of law for the Court.

Johnston v. *Faxon*, 172 Mass., 466.

LAW POINT VII.

The intent of the parties following the suspension by the Government in March, 1912, is clearly expressed and set forth in their correspondence, and the plaintiff was estopped from terminating its contract by the position assumed and the declarations made.

Courts will adopt the construction which the parties themselves have placed on the contract.

Cook v. *Foley,* 152 Fed. Rep., 41.
Aronson v. *Wertheim,* 21 Misc. (N. Y.), 482.
School Dist. v. *Davis,* 76 Neb., 612.
Williams v. *Austen,* 68 Neb., 26.
Bounds v. *Hubbard City,* 47 Tex. Civ. App., 233.

"Generally speaking, the practical interpretation of the contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence."

Old Colony Trust Co. v. *Omaha,* 230 U. S., 100, 118, citing:
Chicago v. *Sheldon,* 9 Wall., 50, 54.
Insurance Co. v. *Dutcher,* 95 U. S., 269, 273.
Dist of Col. v. *Gallagher,* 124 U. S., 505, 510.
School Dist. v. *Esler,* 13 Neb., 52.
State ex rel. Commrs. v. *Case Co.,* 60 Neb., 566, 572.

Although not strictly such, this rule is sometimes treated as a branch of the law of estoppel.

> "The Courts will adopt such a construction of the Contract as the parties by their conduct have placed upon it, when the same is reasonable."
>
> *O'Connor* v. *Harrison,* 132 Ill. App., 264, 269, and cases cited.

The practical construction given by the partners themselves is a proper guide to the meaning of a notice of dissolution, and is of more importance than what is the abstract meaning which the Court may attach to its mere phraseology.

Patterson v. *Camden,* 25 Mo., 13.

In *Brooklyn Life Ins. Co.* v. *Dutcher,* 95 U. S., 269, it was said:

> " 'There is no surer way to find out what parties meant than to see what they have done.' So obvious and potent a principle hardly needs the repetition it has received. And equally obvious and potent is a resort to circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement to the contract and a test of its purpose. The conventions of parties may change such circumstances and conditions, or continue them, but it cannot be separated from them. And this makes the value of contemporaneous construction. It is valuable to explain a statute where disinterested judgment is alone invoked and exercised. It is of greater value to explain a contract where self-interest is quick to discern the ex-

tent of rights or obligations, and never yield more than the written or spoken word requires."

Yowry v. *Hawaii*, 206 U. S., 222.

THE QUESTION OF WHAT WILL CONSTITUTE A BREACH BY ONE PARTY TO A CONTRACT, THAT WILL WARRANT THE TERMINATION OF THE CONTRACT BY THE OTHER PARTY, DEPENDS LARGELY UPON THE GOOD FAITH AND HONEST ENDEAVOR OF THE PARTY CHARGED WITH BREACHING THE CONTRACT, AND WHETHER OR NOT THE ALLEGED BREACH WAS DUE TO THE PARTY'S OWN ACT OR THE ACT OF ANOTHER OVER WHOM HE HAS NO CONTROL.

Delay was imposed upon defendant by Government (pp. 250-252, 321-322). Letters: March 9, 1912 (Exhibit 18); March 29, 1912 (Exhibit 23); April 25, 1912 (Exhibit 24); May 22, 1912 (Exhibit 25).

Defendant sought to use plaintiff's men and plant (pp. 296-297, 251, 262). Exhibits P and Q. Offers to indemnify (Exhibit 4, p. 385; 3, p. 384).

LAW POINT VIII.

The plaintiff waived any rights to terminate its contract from March 9, 1912, to April 25, 1912, within which period the defendant ordered and directed plaintiff to proceed with its work.

A party who assumes one position, by which he has or will benefit at the expense of another, is estopped from assuming a contrary position if it be to the prejudice of the other.

Daniels v. *Tearney,* 102 U. S., 415.
Davis v. *Wakelee,* 156 U. S., 680, 691.

This principle precludes a change of position as to the construction, operation or breach of contract.

Pray v. *U. S.,* 106 U. S., 594.
Union Pac. R. Co. v. *U. S.,* 99 U. S., 402, 418.
Gibson v *Lyon,* 115 U. S., 439, 447.
Hughes v. *Clarksville,* 6 Pet., 369.
Newell v. *Nixon,* 4 Wall., 572.
Hotel Co. v. *Wade,* 97 U. S., 13.
Crawford v. *Halsey,* 124 U. S., 648, 651.
The Waterwitch, 1 Black., 494.

Where both parties to a contract, in acting thereunder, express a like understanding of it, either of them is estopped from afterward insisting upon a different interpretation thereof to the injury of the other.

Pray v. *U. S.,* 106 U. S., 594; and cases cited.

If one believes he has certain rights, and desires to insist upon them, he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights, but waives them, he is estopped from later asserting them.

N. Y. City v. *Pine,* 185 U. S., 93.

This is especially so in the case of the construction of written documents, as contracts.

Lawson v. *Floyd,* 124 U. S., 108, 120.
Irwin v. *U. S.,* 16 How., 513.

The Court held and charged that the acceptance of the contract to set granite on September 15 *was a waiver of all claims which it might theretofore have had,* yet the plaintiff has recovered in its verdict all the moneys expended *theretofore,* and *thereafter;* including all the preliminary expenses and losses incurred or had from January, 1911, to September 15, 1911.

The Court instructed the jury that

> "in determining the amount of delay caused by defendant to plaintiff prior to the acceptance by the latter of the option exercised by the defendant to require the plaintiff to set the granite in September, 1911, such acceptance by plaintiff of said option constituted a waiver of all claims or complaints which it might theretofore have had, and constituted an estoppel to prevent plaintiff from claiming delay up to said date so far as relates to termination of the contract" (p. 376).

The verdict shows that the jury allowed, in its verdict to plaintiff the full and entire amount claimed to have been proven by plaintiff, viz.:

Amount claimed (p. 203)	$45,617.09
Less prospective profits (fol. 332)	9,738.00
Verdict (p. 372)	$35,879.09

This represented every dollar that the plaintiff pretended to have expended in connection with the work, and giving credit for

Cash payments (p. 127)	$4,439.55	
Cash, other sources (p. 200)	1,086.51	$5,526.06

(Bill of Particulars, *infra,* p. 29.)

Now, there is no possible way by which these disbursements *can be apportioned to any period of delay* nor can any part be separated as having been disbursed *for setting the granite,* which work was completed and the price determined, and paid.

THE ALLEGED BREACHES BY DEFENDANT, OF WHICH PLAINTIFF COMPLAINS AND WHICH WERE MADE THE GROUND OF PLAINTIFF'S TERMINATION OF THE CONTRACT, WERE EACH AND ALL SEVERALLY CONDONED AND WAIVED.

THE PLAINTIFF WAIVED ANY REQUEST OR ORDER BY THE DEFENDANT TO BEGIN WORK, AS BY EXHIBIT 7, BY ASKING AND INSISTING THAT THE DATE OF COMMENCEMENT SHOULD BE FIXED IN SEPTEMBER, 1911, AND AS LATE AS SEPTEMBER 16, 1911.

(See testimony, pp. 93, 159, 160-161, 180-181, and Exhibits I, J, L and W.)

ALL DELAYS PRIOR TO MARCH 9, 1912, WERE CONDONED AND WAIVED BY THE PLAINTIFF.

THE OFFICERS OF THE PLAINTIFF AND OF THE DEFENDANT WERE MEN LONG EXPERIENCED IN THE BUILDING BUSINESS, AND IN A LARGE TERRITORY, AND WERE THOROUGHLY FAMILIAR WITH THE VEXATIOUS DELAYS ATTENDING PUBLIC WORKS.

LAW POINT IX.

The measure of damages as stated by the Trial Court in its instructions to the jury is erroneous and not in accordance with the law of the case. The measure of damages of the delay is found in Clause 11th of the contract, and defendant may not be deprived of its protection.

Carlin Constn. Co. v. *Guerini Stone Co.*, 240 U. S., 264.

Where the measure of damages is provided for in the contract, the Court will uphold and enforce that measure.

Van Tuyl v. *Young*, 23 Ohio Circuit, 15.
Garfielde v. *U. S.*, 93 U. S., 242.

Contracts must be construed according to the intention of the parties if their intention be clear, and if not, then as they have shown it by practical construction.

Hargraves Mills v. *Gordon*, 137 App. Div., 695.

> "When the parties to a contract, in which the damages to be ascertained growing out of a breach are uncertain in amount, mutually agree that a certain sum shall be damages in case of a failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule of law applicable to the construction of contracts that will enable a court of law to say that they intended something else."

The United States Supreme Court, per White, *J.*, in *Sun Printing & Pub. Assn.* v. *Moore,* 183 U. S., 642, 673, 662; quoting with approval from *Clement* v. *Cash,* 21 N. Y., 253, 257.

Numerous other cases lay down the same rule. Among them are the following cases cited with approval by United States Supreme Court in *Sun P. & P. Co.* v. *Moore, supra:*

Irving v. *Manning* (1847), 1 H. L. Cas., 287, 307, 308.

Ranger v. *Grt. Western Ry. Co.* (1854), 2 H. L. Cas., 72, 94, 104, 118.

Dimech v. *Corlett* (1858), 12 Moore's P. C., 199, 229.

Lord Elphenstone v. *Monkland Co.* (1886), App. Cas., 332, 345, 346.

Price v. *Green* (1847), 16 M. & W., 346, 354.

Dakin v. *Williams,* 17 Wend., 447, 454; s. c., 22 Wend., 201, 213.

Bagley v. *Peddie* (1857), 16 N. Y., 469, 471.

Other United States cases lay down the same rule:

U. S. v. *Bethlehem Steel Co.,* 205 U. S., 105.

Hart v. *Penn. R. Co.,* 112 U. S., 331.

Taylor v. *Sandiford,* 7 Wheat., 13.

If defendant had breached the contract, the damages recoverable would be at most the difference between the contract price and what it reasonably would have cost the plaintiff to perform the remainder of the work, deducting what he had al-

ready been paid. No recovery can be had for the actual disbursements by the contractor where those disbursements were expended in doing the work under the contract or in the preparation for doing the work, unless, indeed, the breach is *ad limini* and before a substantial part of it is done No special damages are recoverable in this case for the expenditures made by the contractor, because those expenditures were made solely and only in the performance of the work and the necessary preliminaries to said work.

The Court in its charge not only permitted the plaintiff to recover all the disbursements it had made in connection with the contract, but allowed the jury to pass upon prospective profits as well for the entire job, whereas the plaintiff had been paid in part for the work which it had done and the materials it had furnished.

If the plaintiff had so conducted the work, or had entered upon an improvident contract, one in which it had spent $35,000 to do approximately 10 per cent. of its contract, then the defendant conferred a benefit upon the plaintiff if it gave it just and proper cause to terminate its contract. There can be no doubt but that the plaintiff in this case would have been greatly benefited had it been excused from further performance of its contract between March 9 and May 22, 1912. It was a losing contract for plaintiff; any act by defendant that relieved plaintiff of the performance of the contract caused it no loss or damage.

In this case we have a sub-contractor recovering from the principal contractor the sum of $35,873.09 verdict (p. 32) and $8,609.54 (fol. 99) interest under a termination of a contract to do work on a Federal post office and court house at San Juan, Porto Rico, at a total contract price of $64,750 (p.

18) and when the plaintiff confessedly did not do 25 per cent. of his contract work (pp. 157, 161, 193-195) in quantity and when he did only $5,730 of the contract work in value (p. 195) (573 cubic yards at $10) or 9 per cent., about one-eleventh of the job. There is certainly plenty of evidence and conclusive proof that the contract was a losing job (pp. 183-188, *infra*).

The Courts will not apply a rule of damage which will give to plaintiff a greater compensation for a breach of the contract than it could receive had it been performed.

Bates v. *Diamond Salt Co.*, 36 Neb., 900.

The Courts have held that it must reasonably appear that profits would have been made had the terms of the contract been carried out, and that their loss necessarily followed prevention of performance by the defendant to warrant the jury in awarding damages.

Cope v. *Bangor Tr. Co.*, 39 Pa. Super. Ct., 134 (1909).
Carlin v. *Lombard & Co.*, 162 N. Y., 628; 19 App. Div., 287.
Wilson v. *Wernwag*, 217 Pa., 82.

The Massachusetts Courts, when the contractor has been prevented from completing his contract, permit plaintiff to recover the value of the labor and materials furnished, and of which the owner had the benefit.

Conolly v. *Sullivan*, 173 Mass., 1.
Hayes v. *Wagner*, 113 Ills., 299; 220 Ills., 256.

The only damages that plaintiff can recover from the defendant is *the value of the contract to*

plaintiff, for at most plaintiff has been deprived only of his contract.

Baker Transfer Co. v. *Merchants Co.,* 42 N. Y. Supp., 76.

"This contract was an executory contract, or at least partially executory; and it seems to be a familiar rule of damages, that in such a contract the damages consist of the value of the contract, and this may be established by showing what the contract price for the work is, deducting therefrom the cost of performing it. This was evidently the view entertained by the respondents upon the trial, because that was the tendency of their evidence. The Court, however, seems to have taken a radically different view, and that under this contract everything was to come in, and nothing was to go out. The charge that the plaintiffs were entitled to recover the total amounts which they would have received, without any deductions for the cost of fulfilling the contract, but only deducting the cash which had been paid to them, was erroneous. The counsel for the defendant duly raised this question as to the cost of performing the contract by his requests to charge, and therefore is entitled to take advantage of the error committed by the learned judge who presided at the trial.

"The plaintiff is entitled to recover as damages, if he prevailed, the difference, if any, between what it would have cost him to complete the work according to the con-

tract and the sum which he was to receive therefor."

Gaffey v. *United Shoe Co.,* 202 Mass., 48, 53.

Action for damages alleged to have resulted from the refusal of the defendants to allow plaintiff to perform. The measure of damages given to the jury in the instructions was the difference shown by the evidence between the cost price and what it would have cost the plaintiff to have done and completed the work according to the terms of the contract.

Hayes v. *Wagner,* 113 Ills., 299; 220 Ills., 256.

In contracts partly executed, as the one at bar, where the plaintiff has entered upon the performance of his work and has been paid in part, and he has been prevented from completing his contract, the measure of damages is not the total expenditures made by the plaintiff, but the contract price of the work performed and the profit, if any, which he would have made on the balance of the work had he been allowed to complete it.

Chase v. *Smith,* 35 Wash., 631; 77 Pac. Rep., 1069.

Doolittle v. *McCullogh,* 12 Oh. St., 360.

Wilson v. *Borden,* 68 N. J. L., 627; 54 Atl. Rep., 815 (1903).

Noyes v. *Pugen,* 2 Wash., 653.

Koon v. *Greernon,* 7 Wend., 121.

Bagley v. *Bates,* Wright, 705.

Hoyle v. *Stellwagen,* 28 Ind. App., 681; 30 Ind. App., 674.

Sullivan v. *Moffatt,* 70 N. J. L., 7 (1903); 56 Atl. Rep., 304.

Harrison v. *Clark,* 78 N. J. L., 236, 238.
Kehoe v. *Rutherford,* 56 N. J. L., 23.
Westlecraft v. *Barry,* 33 N. J. L., 53.
Western v. *Sharp,* 14 B. Mon., 177.
Alder v. *Keighley,* 15 M. & W., 117.

The owner may show by evidence that the performance and fulfillment of the contract would have cost more than the contractor was to receive for the work.

Durkee v. *Mott,* 8 Barb., 423.
Waco T. R. R. Co. v. *Shirley,* 45 Tex., 355.

And see:

Hinckley v. *Pittsburgh B. S. Co.,* 121 U. S., 264.

Special damages cannot be recovered unless the party breaking the contract had knowledge of the special circumstances and engagements from which such damage resulted.

Myerle v. *U. S.,* 31 Ct. Cl., 105.
Keystone Drill Co. v. *Stahl,* 17 Pa. Co. Ct., 498.

He is not entitled to the expense of moving his outfit to the field of operation, that being an item of cost in performing the work, and an item of expense which figures prominently in determining his profits on the job.

Buckley v. *U. S.,* 19 Wall., 37.
Hawley v. *Corey* (Utah), 33 Pac. Rep., 695.
O'Connor v. *Smith* (Tex.), 19 S. W. Rep., 168 (1892).
Curtis v. *Smith,* 48 Vt., 116.

If the contractor recover the sum total of the benefits and gains of the contract, he cannot recover the expenses of preparation to commence performance of the contract, for he would have incurred those expenses if the owner or company had performed his part.

Sedgwick on Damages, 8th Ed., Sec. 607, and cases cited.
Sedgwick on Damages, 8th Ed., Sec. 617.
Miller v. *Hahn,* 48 N. Y. Supp., 346 (1897) (contractor must show that he suffered such loss).

Where a contract is wrongfully terminated by one party after part performance by the other, the right of the party performing to recover the value of the labor performed or materials furnished, irrespective of the contract price, depends upon whether, having regard to the contract, the party wrongfully terminating it would thereby enrich himself at the expense of the other.

Doolittle v. *McCullough* (1861), 12 Ohio St., 360, distinguished and limited.
Wellston Coal Co. v. *Franklin Paper Co.,* 57 Ohio St., 182.

When a contractor has elected to consider the contract rescinded and brings his action for labor and materials generally he cannot recover prospective profits on unexecuted parts of the contract.

Clark v. *Mayor,* 4 N. Y., 338 (1850).

To recover any damages he must show special loss or damage.

Chamberlain v. *McCallister,* 6 Dana, 352.
Caldwell v. *Reed,* Littel Sel., Cases, 366.

The cost of the work, in determining prospective profits, so far as it was prosecuted by the contractor, may be shown to determine the cost of the unfinished work, if the unfinished part was essentially the same as that completed.

Tennessee & C. R. Co. v. *Danforth* (Ala.), 13 So. Rep., 51 (1893); 20 So. Rep., 502.

The cases hold that the contractor should make reasonable deductions for his time, which it would require to perform, and for his relief from the care, trouble, risk, responsibility and anxiety attending a full performance of the contract.

Masterton v. *Brooklyn* (N. Y.), 7 Hill, 62.
Speed v. *U. S.* (U. S.), 8 Wall., 77.
Waco T. R. R. Co. v. *Shirley,* 45 Tex., 355.
Nash v. *Hoxsey,* 59 Wis., 384.
Goodrich v. *Hubbard,* 51 Mich., 63.

LAW POINT X.

The law of *United States* v. *Behan* has been misapplied to this case. It is clearly distinguishable.

The case of *U. S.* v. *Behan* is distinguishable from the case at bar in the following respects:

(1) The plan of the public improvement was a failure, the work abandoned and the plaintiff ordered to cease all operation; an unequivocal refusal to perform.

(2) The contract was of such a character as to require extensive preparations and large initial expenditure.

(3) The breach by the Government was *in limini,* no estimate or payment for work done having been

made. The contractor's efforts were preliminary and experimental, ending in *failure.*

(4) The work undertaken was experimental, extraordinary and unusual, being for the improvement of the Mississippi River at New Orleans, and involved an undertaking pursuant to a method, process and plans adopted by the Government. The work in engineering was an innovation, and not the erection and completion of an ordinary Government post office and custom house involving the setting of granite and the placing of ordinary concrete.

(5) The plaintiff contractor gave credit to the defendant what he received from the sale of his plant, tools and material at the market selling price.

No such credit in this case.

(6) The defendant *"voluntarily and wrongfully* put an end to the contract"—the act was *"the wilful and wrongful putting an end to a contract* and *preventing* the other party from carrying it out." While in the case at bar the prosecution of a part of the work was delayed for a short time by the Government, over whom defendant had no control.

The *Behan* case holds that when a party to a contract has been injured by the abrogation of the contract by the other party he may recover his *"actual losses," "all damage which the injured party has sustained";* and that if *the circumstances of the case* prevent the application of the ordinary and usual rule of the measure of damages, that then equity will warrant a different rule that shall do justice to the parties.

As the Supreme Court says of the opinion of the Court of Claims, "We think that these views, *as applied to the case in hand,* are substantially correct," to wit:

> "The object is to indemnify him for his losses sustained and his gains prevented by

> the action of the party in fault, viewing these elements with relation to each other. The profits and losses must be determined *according to the circumstances of the case and the subject matter of the contract.* The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part and the probable cost of its completion, the whole contract price and the estimated pecuniary result, favorable or unfavorable to him, had he been permitted or required to go on and complete his contract, *may be taken into consideration.*"
>
> Citing numerous cases.
>
> *U. S.* v. *Behan,* 110 U. S., 343.

It is evident throughout that case *that the circumstances of the case and the subject-matter of the contract* necessitated the adoption of this measure of damages.

No such necessity existed in the case at bar, for the plaintiff's chief officer himself declared unequivocally that there were no difficulties whatever about the construction of this Government building and that the cost thereof was easily and reasonably determinable (fols. 322-332, 431-452, 532-538).

The case of *U. S.* v. *Behan* is on the face of it no authority for the establishment of such a measure of damages, in an ordinary building contract, as has been adopted by the Trial Court in this case.

Decisions which have approved and followed it make the same distinction and hold that "if anticipated profits under a contract *are not definite* and *defendant has put an end to the contract,* plaintiff may, it seems, recover the expenses incurred in preparing to perform his contract."

O'Connell v. *Ross,* 56 Ark., 603.

At page 610 the Court says:

> "As to the other branch of the charge upon the measure of damages, a plaintiff is entitled to recover the expenses incurred by him in his preparation to perform a contract which, without his fault, the defendant has put an end to, where the anticipated profits under the contract are too speculative to admit of clear and direct proof."
>
> 2 *Sedgwick on Damages,* Section 607.
>
> 5 *Lawson's Rights, etc.,* Section 2623.
>
> *U. S.* v. *Behan,* 110 U. S., 338.
>
> *Howard* v. *S. & B. Mfg. Co.,* 139 U. S., 199.

In such case the plaintiff was held

> "entitled to recover the loss he had sustained by reason of his outlay and expenses made and incurred in the fair endeavor to perform the contract which he had assumed. He *had partially enjoyed the benefit of his preparatory expenditures in the partial performance of his contract.* It was proper, therefore, *to apportion such expenditures,* and the defendants have not suggested that the charge ought not to bear an interpretation which leads to that result."

Parish v. *MacVeagh,* 214 U. S., 124 (p. 59), is an interesting case, involving the case of *U. S.* v. *Behan.* It was a contract to procure and deliver ice for the year 1863. Order for 30,000 tons, for the use of the sick in the armies of the field, without delay, at four remote places, which was suspended in six days until further instructions. 12,768 tons had been delivered and paid for. The bal-

ance of 17,232 tons was lost to claimant. The case had been decided by the U. S. Supreme Court, and ordered paid by Congress. The Committee of Congress questioned *the measure of damages,* and the situation arose on a mandamus to compel payment. The Court (at p. 133, middle) specifically states the ground in *the Behan case* as the reason for the rule of damage discussed. In speaking of the report of the Congressional Committee, the Court says:

> "The report recognized that profits cannot always be recovered; that they may be remote and speculative, incapable of that clear and direct proof which the law requires. But it is manifest that *The Committee* did not think the case called for that limitation, for it was said that the reasons for the application of the equitable rules of the *Behan* case were not nearly so clear and strong as in the *Parish* case, and declared as follows:
>
> 'In the latter case, the contract expressly provided what should be paid for the ice delivered at the various places named. The profits, therefore, were readily and easily ascertainable. In fact, that was the theory of the plaintiff in making his case before the Court of Claims, and the record of that court shows that the proofs on that point were explicit, bringing the case properly within the principles laid down in *U. S.* v. *Behan.*
>
> 'In a word, it is perfectly clear that the Supreme Court quite overlooked one of the most important findings of fact in the *Parish* case. At all events, there is no doubt that the law is properly stated in

> the *Behan* case. And all the present bill contemplates is a final and proper settlement on *the rule of law* which is older than our republic, and is everywhere recognized as the equitable one that can be applied to the premises.' "

The U. S. Supreme Court evidently took exception at the Congressional Committee's overruling the United States Supreme Court, and said:

> "And the profits, the Committee said, 'were readily and easily ascertainable.' Indeed, because they were, their calculation was referred to an executive officer.
>
> "If to ascertain them involved an intricate judicial problem, the reference would have been to the judicial tribunals, for we cannot agree with the intimation of the Government that Congress would imagine that the Court of Claims and this court were unable 'to master the difficulties' of that problem. The better supposition is that Congress regarded the controversy as over, and that the time for reparation had arrived, and that it might be quick and complete, referred the matter to that officer who could best state the balance and pay it."

The opinion of the Supreme Court sustains every point of defendant's argument and brief, and it had determined

> "that the prospective profits under a contract to supply 30,000 tons of ice in 1863, in remote parts of the United States, on battlefields, in the briefest possible time, *were remote and speculative* and not *'readily and*

easily ascertainable,' which brought the case within the *Behan* case."

Parish v. *MacVeagh*, 214 U. S., 124, 137-138.

In 1863 there was no ice industry or refrigerator cars.

McGowan v. *Parish* (the same case), on appeal from the Court of Appeals of the District of Columbia, is reported in 237 U. S., 285, and the circumstances with respect to the case of *U. S.* v. *Behan* are set forth at pages 288 *et seq.*

The plaintiff's president admitted and declared there was no difficulty in estimating the cost of the work (p. 148) and in showing its reasonable or actual value (pp. 148-150, 174-176). Plaintiff's president made an estimate of the cost (pp. 108-114, 148-151, 174-176).

The prospective profits were therefore easily determinable, if there had been any. Everything shows that the cost would greatly exceed the contract price (pp. 183-188, *supra*).

In *Mueller* v. *U. S.*, the contractor recovered only his actual damages during the performance and completion of his contract.

Mueller v. *U. S.*, 113 U. S., 153.

It is only in those cases of breach *in limini*, or where the peculiar circumstances of the case and the subject matter of the contract prevent the ordinary rule or measure of damages being applied, that a contractor has been allowed to recover for the preliminary expenses incurred in preparation to undertake his work, for the reason that if the work has been entered upon, part of those preliminary expenses incurred in the preparation have been repaid in the profits on the work actually done

and performed and paid for. This is particularly true with respect to the granite setting done and completed under the election of an option provided for in the contract, which contract for granite setting had been mutually abrogated.

The Trial Court erred in permitting the jury to consider the profits of the whole contract, as part of the work had been done and paid for. The only question that could have been left to the jury under the circumstances was the profits on the uncompleted work.

The verdict should have been set aside by the Trial Court for the setting of the granite constituted no part of the contract alleged to have been breached. The case of setting the granite, for which plaintiff received his price in full, and the profits therefor should have been separated from the cost of the concrete work. It was error to allow it to go to the jury, and to become a part of the verdict.

LAW POINT XI.

There were two contracts which have been treated as one. Only one was terminated by plaintiff, the other having been mutually abandoned.

It was error to allow the expenses and disbursements of *both* contracts to go to the jury, for *one* had no existence May 22, 1912 (pp. 127, 39, 68).

The contracts were distinct.—A divisible contract is one by its nature and purposes susceptible of division and apportionment having two or more parts in respect to matters and things contem-

plated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be.

> "Where the contract expressly apportions the price of each item to be performed, or where it embraces several undertakings, each supported by a distinct consideration, the contract is severable.
>
> "An agreement to do several things at several times is divisible unless the consideration to be paid is entire." 7 Am. Eng. Ency. Law (2d Ed.), 95. And as to building and construction, or working contracts as they are called, it is settled that "Where a working contract requires the performance of several separate and distinct items, the price for which is apportioned to each item * * * it will be regarded as severable." 30 Am. Eng. Ency. Law (2d Ed.), 1208.

This is a divisible or separable contract; one agreement being to perform the concrete work at a total lump sum price; the other agreement which was fully performed being to set certain granite at a unit price.

Johnson v. *Dahlgren,* 31 N. Y. App. Div., 204, 267.
Spear v. *Snider,* 29 Minn., 463.
Barnard v. *McLeod,* 114 Mich., 73.
Sanitary Dist. v. *McMahon Co.,* 110 Ill. App., 510.
Tenny v. *Mulvaney,* 8 Oreg., 129.
Maryland F. Co. v. *Lorenz,* 44 Md., 218.
Lipton v. *Feitner,* 20 N. Y., 423.
Pierson v. *Crooks,* 115 N. Y., 554.

If the part to be performed by one party consists of several distinct and separate items and the price to be paid by the other is apportioned to each item to be performed * * * such a contract will generally be held to be severable.

2 *Parsons on Contracts*, 674.

Citing numerous cases, including:

Obery v. *Lander*, 179 Mass., 125.
Kaufmann v. *Raeder*, 108 Fed., 171.
Robinson v. *Green*, 3 Metc., 159.
Perkins v. *Hart*, 11 Wheat., 237, 251.

A breach of one of the agreements in a severable contract does not constitute a breach of the other, and no recovery may be had on account of the other agreement.

7 *Am. Eng. Encyc. Law*, 97.
Hutchins v. *Sutherland*, 22 Nev., 363.
Macklain v. *Sales*, 130 Mich., 66.
Katz v. *Bedford*, 77 Cal., 319.
McGrath v. *Cannon*, 55 Minn., 457.
Burwell Co. v. *Wilson*, 57 Neb., 396.
Thomas v. *Richards*, 124 Ga., 942.
Pacific Mill Co. v. *Inman*, 46 Oreg., 352.

A breach of one of the agreements in a divisible contract does not constitute the breach of the other agreement, and no recovery may be had as for a breach on that other contract.

7 *Am. Eng. Encyc. Law* (2d Ed.), 97.

If it (a contract) is severable, on the other hand, and for any reason entire performance cannot be had, an apportionment will be allowed. The

breach of one of the agreements in such a contract does not constitute the breach of another.

7 *Am. Eng. Encyc. Law* (2d Ed.), 97.
3 *Page on Contracts*, 2288, citing cases.

PLAINTIFF ITSELF DELAYED THE WORK AND CAN CHARGE NO BREACH TO THE DEFENDANT ON THAT ACCOUNT.

If the other party itself by his own act causes delay, he cannot recover any damages for delay.

Wyandott Ry. v. *Bridge Co.*, 100 Fed. Rep., 197; 40 C. C. A., 325.
King Mfg. Co. v. *St. Louis*, 43 Fed. Rep., 768; 10 L. R. A., 826.
Blymer Ice Mach. Co. v. *McDonald*, 48 La. Ann., 439; 19 So. Rep., 459.
Davis v. *Light Co.*, 57 Minn., 402; 59 N. W. Rep., 482.
Murphy v. *Orne*, 185 Pa. St., 250; 39 Atl. Rep., 959.

LAW POINT XII.

The plaintiff's action should have been on the common counts, in *quantum meruit*.

The case of *U. S.* v. *Behan, supra,* is also an authority for the proposition that

> "When a party injured by the stoppage of a contract elects to rescind it, then it is true he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his serv-

> ices actually performed, as upon a *quantum meruit*. There is then no question of losses or of profits."

It is submitted and contended on the part of the defendant that the letter of May 22, 1912 (Exhibit 25, p. 400), was in effect a rescission of the contract between the parties, and that a notice and declaration that

> "Under these circumstances and owing to your entire failure to comply with the terms of the contract, we hereby notify you that we now terminate the contract, and shall proceed no further with the work, and that we shall hold you liable for the damages we have sustained by reason of your breaches of contract" (p. 401),

was a rescission of the contract.

Defendant knows no discrimination between the *termination* of the contract in the terms stated and a *rescission or abrogation* of the contract.

Whatever the civil law or the Spanish law of Porto Rico may provide in respect to this matter, it is submitted that it does not apply, since the contract was made and terminated in the United States of America, to wit, in the City of New York.

This word *"terminated"* has been construed by the highest Court of the State of New York as synonymous with the word *"rescind,"* and the rule of damages was held all that the plaintiff may lose by way of profits in not being allowed to fulfill the contract, or, if he waive the contract, the actual and reasonable worth of the work done on the common counts, in which case plaintiff was

not allowed to recover as damages anything for speculative profits, but the actual value of the work and materials.

Clark v. *Mayor*, 4 N. Y., 338, 343.

In this case it was held that if he waived the contract and brought his action he could recover only on the common counts what the work done was actually worth. This is in accord with the United States Supreme Court decision, *U. S.* v. *Behan*, 110 U. S., 343.

The contract between the parties (pp. 12-21) was made and entered into in the United States of America to be performed in the Island of Porto Rico, and it was breached or terminated on or about May 22, 1912, by letter written in Boston and received in New York (pp. 400-401). The parties to the contract and to the suit are citizens of the United States, to wit, the plaintiff of Boston, Mass., and the defendant of the City, County and State of New York.

That the plaintiff herein intended to rescind the contract is evidenced by the original complaint signed and sworn to by the plaintiff's agent at Porto Rico. In it appears the following:

> "10. That under date of May 22, 1912, plaintiff notified defendant, in writing, of *its election to cancel or rescind said contract* and to bring its action for damages for breach thereof."

Subsequently, when plaintiff's attorney realized the real meaning of the words *cancel or rescind*, he amended his complaint and inserted instead the words *its election to terminate said contract* (fols. 30, 83).

If the act of May 22, 1912, cancelled or rescinded said contract, then the plaintiff is limited to its action for a *quantum meruit,* which is not the basis of the action in this case. The plaintiff has submitted its claim for damages for the breach of the contract as if the contract still existed, but had been breached by the defendant, in which case it would be entitled only to recover the benefit its has conferred upon the defendant. Plaintiff has misconceived its action, and the complaint should be dismissed. The bill of particulars shows that the action is to recover all the disbursements and expenses which the plaintiff had made, and in addition thereto its anticipated profits (fols. 85-89).

The verdict and judgment must be set aside if the Court hold that the act of the plaintiff on May 22, 1912, as disclosed by its letter of that date (Exhibit 25, p. 400), was an act of rescission.

U. S. v. *Behan, supra.*

If

> "the plaintiff was prevented by the defendant from going on with the contract, then the plaintiff would be entitled to recover, independently of the contract price, the value of the labor and material furnished and of which the defendant had had the benefit, viz: on the Common Counts."

Connolly v. *Sullivan,* 173 Mass., 1, 5.

LAW POINT XIII.

Plaintiff was bound to mitigate its damages, which it failed, neglected and refused to do.

Defendant was entitled to credit in mitigation of damages for the value or use of such material to plaintiff for other purposes.

Baker Transfer Co. v. *Merchants' Co.*, 42 N. Y. Supp., 76:

> "The defendant endeavored to prove that the material which the plaintiff claimed to have provided for the purpose of fulfilling this contract had been used in its business, and was not lying idle, and consequently that the defendant should have had the benefits of the earnings of that part of the plaintiff's plant which it had provided for the performance of its contract with the defendant, and which it had used in its own business. This evidence was excluded, and, we think, erroneously. It was the duty of the plaintiff, if possible, to mitigate the damage arising from the breach of the defendant in fulfillment of the contract. If it used the material provided in its own business, it was clearly the right of the defendant to have credit therefor."

The plaintiff should have mitigated his losses and expenses, and cannot charge or recover from defendant any expenses that he could reasonably prevent.

> "The rule is that where a party is entitled to the benefit of a contract, and can save

himself from loss arising from a breach of it at a trifling expense, or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damage only as with reasonable endeavors and expenses he could not prevent."

Cunningham Iron Co. v. *Warren Mfg. Co.* (C. C.), 80 Fed. Rep., 878.

"The law required him to take that course by which he could secure himself with the least damage to the defendant"

Warren v. *Stoddart,* 105 U. S., 224, 229.
Miller v. *Mariners' Church,* 7 Me., 51.
Russell v. *Butterfield,* 21 Wend., 300.
United States v. *Burnham,* 1 Mason, 57.
Taylor v. *Read,* 4 Paige, 561.
Marsh v. *MacPherson,* 105 U. S., 709.

Damages that could have been avoided by reasonable exertion and care cannot be recovered.

Hodges v. *Fries* (Fla.), 15 So. Rep., 682 (1894).

See:

Sedgwick on Damages, 8th Ed., Sec. 617.

The plaintiff failed to reduce its damages:

(1) By not selling to the highest bidder, or at the best market price, its materials, plant and tools, which it had on hand when it abandoned the work, and the cost of which has been included in the verdict of the jury (pp. 29, 114, 200-204).

All the record shows is that they were left on the building site and were used by some other persons after us (p. 201), and that they left our possession by order of the Court (p. 201). It is not shown that defendant had the benefit of them, al-

though they were charged to him and are in the verdict (pp. 202, 29, 382, 383).

(2) By incurring expenses and making disbursements for matters and things not connected with the contract work, which is contained in the verdict.

(3) By including in the expenses and disbursements, those *for setting the granite,* for which defendant paid plaintiff the contract price, per contract.

(4) By including in the expenses and disbursements recovered, the wages and expenses of Mr. Follett, from May 22nd to July 1st, 1912.

(5) By declining and refusing to defendant the employment and use of plaintiff's masons, carpenters and skilled mechanics, which they had brought from the States to Porto Rico at great expense, and the cost of which is in the verdict.

(6) By extravagant, wasteful and unnecessary expense of transportation of Mr. Guerini and Mr. Lootz to and from Porto Rico, at frequent intervals, wholly unnecessary to the work, and to its great loss and detriment.

LAW POINT XIV.

The verdict cannot stand, as it includes expenses and disbursements not made in the performance of the contract.

Plaintiff made disbursements and expenditures for the erection of mills and shops for custom trade not in connection with the contract work, and did work in these shops and mills for outsiders, and such disbursements cannot be charged as damages for a breach of contract by defendant, which

had nothing to do with the business conducted by plaintiff (pp. 131-133, 200, 276).

It was shown that the shops or mills erected by plaintiff (p. 77) were used January to September (8½ months, pp. 37-38, 66, 256-257), in making about thirty simple forms 1 ft. x 1 ft. x 3 ft. for the building (p. 257), and in making forms *not necessary* for the building.

It is admitted by plaintiff that it did do and conduct such custom business (pp. 131-133), and that Guerini made molds and castings *more than were not necessary* (pp. 66, 77), and that plaintiff's officers knew about it (pp. 131-133, 200).

Plaintiff may not compel defendant to accept from plaintiff what it made by the venture or business, or what it says it received from it, as defendant never agreed to go into partnership with plaintiff in a business of manufacturing decorative artificial stone in Porto Rico.

Notwithstanding, however, the verdict contains all the expenses and disbursements of this business and custom trade; and defendant has presumably been credited by the jury for the profits that plaintiff made (pp. 132, 200).

This is one of the many errors in the case.

LAW POINT XV.

No proposition is better known to the law than that damages recoverable for the breach of a contract are limited to those in contemplation of the parties at the time the contract was made.

The contract provided for delay and fixed the measure of damages for delay. The United States

Supreme Court so held and decided (240 U. S., 264).

If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach. We have to consider, therefore, what the plaintiff would have been entitled to recover in that case, and that depends on *what liability the defendant may be supposed to have assumed consciously,* or *to have warranted the plaintiff reasonably to suppose that it assumed,* when the contract was made.

This point of view is taken by implication in the rule that "a person can only be held responsible for such consequences *as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract.*"

Globe Refining Co. v. *Landa Cotton Oil Co.,* 190 U. S., 540, 544.

Grebert-Borgnis v. *Nugent,* 15 Q. B. D., 85, 92.

Home v. *Midland Ry. Co.,* L. R., 7 C. P., 583, 591.

Hadley v. *Baxendale,* 9 Exch., 341, 354.

Western Union Tel. v. *Hall,* 124 U. S., 444, 456.

Howard v. *Stillwell & B. Mfg. Co.,* 139 U. S., 199, 206.

Primrose v. *Western U. Tel. Co.,* 154 U. S. A., 1, 32.

Notice after the contract was made and before breach would be enough, is not accepted by the later decisions.

See:

Hydraulic Eng. Co. v. *McHaffie,* 4 Q. B. D., 670, 674, 676.

The consequences must be contemplated at the time of the making of the contract.

The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed.

Griffin v. *Colver*, 16 N. Y., 489.

It has been well settled since the decision in *Masterton* v. *The Mayor of Brooklyn*, 7 Hill, 61, that a plaintiff may rightfully recover a loss of profits as a part of the damages for breach of a special contract, but in such a case the profits to be recovered must be such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfillment.

In the language of the Supreme Judicial Court of Massachusetts in *Fox* v. *Harding*, 7 Cush., 516, 522:

> "These *are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into.*"

But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of contract in suit.

This rule was applied in the case of the *Philadelphia, Wilmington & Balto. R. R.* v. *Howard,* 13 Howard, 307.

Western Union Tel. Co. v. *Hall,* 124 U. S., 444, 454.

Most contracts are entered into with the view to future profits, *and such profits are in the contemplation of the parties,* and so far as they can be properly proved, they may form the measure of damages. As they are uncertain they must to some extent be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy.

Wakeman v. *Wheeler & Wilson Mfg. Co.,* 101 N. Y., 205.

The rule that the damages recoverable for breach of contract are only such as may *reasonably have been within the contemplation* of the parties when making the contract, as the probable result of a breach and that other damages are too remote, applies equally where plaintiff seeks to evade liability under the contract, as when he seeks to recover under the contract.

Pacific Club v. *Commercial Assurance Co.,* 12 Cal. App., 503.
Heinemann v. *Head,* 50 N. Y., 27.
Hadley v. *Buxendale,* 9 Exch., 341.
Industrial Works v. *Mitchell,* 114 Mich., 30.
J. Wragg & H. v. *Mead,* 120 Iowa, 319.

Where party knew construction that had been given to another contract, he was precluded from asserting that a different rule be followed here.

Bowers Dr. Co. v. *U. S.,* 211 U. S., 176, 188; aff'g 41 Ct. Cl., 214.

To hold a party for damages for a breach on his part of his undertakings, the circumstances must be such that it may reasonably be supposed to have been contemplated by the parties when making the contract that such loss would probably follow its breach, and hence that the party consented to become liable for it, and such circumstances, if relied upon, must be pleaded and proven.

> *Lilljengren F. & L. Co.* v. *Mead* (42 Minn., 420), 44 N. W. Rep., 306; following 28 Minn., 470.

THE PLAINTIFF HAD NOTICE, AT THE TIME IT MADE THE CONTRACT WITH THE DEFENDANT, IN AND BY THE GOVERNMENT SPECIFICATIONS REFERRED TO AND EMBODIED IN SAID CONTRACT, THAT THE GOVERNMENT MIGHT SUSPEND ANY PORTION OF THE WORK AT ANY TIME (p. 412); AND WHILE THE RIGHT OF THE GOVERNMENT TO SUSPEND DEFENDANT'S WORK MIGHT BE MODIFIED BY OTHER CLAUSES IN THE CONTRACT BETWEEN PLAINTIFF AND DEFENDANT, AS SET FORTH IN THE OPINION OF THE SUPREME COURT, YET THE KNOWLEDGE OF THE PLAINTIFF THAT THE GOVERNMENT RESERVED THE RIGHT TO SUSPEND DEFENDANT'S WORK MUST HAVE A STRONG BEARING UPON WHAT DELAYS WERE IN CONTEMPLATION OF THE PARTIES, AS WELL AS THE CHARACTER AND PERIOD OF THOSE DELAYS OR SUSPENSIONS.

(See Exhibit E, p. 411, Mod.; 412; delays; 414, par. 2; Exhibit O, p. 438; Testimony, pp. 287, 139, 141; Exhibit 4, p. 385; and also Exhibits 3 and 2, pp. 383-384.)

WHEN THE PARTIES TO A CONTRACT HAVE PROVIDED FOR DELAY AND HAVE FIXED THE MEASURE OF DAM-

AGE FOR DELAYS, ANY DELAY WITHIN THE REASONABLE CONTEMPLATION OF THE PARTIES WILL NOT BE A CAUSE FOR A TERMINATION OF THE CONTRACT BY EITHER PARTY.

LAW POINT XVI.

It was error for the Court to allow interest on the verdict of the jury, or to leave it to the jury to fix the date from which interest was to be allowed (fols. 1140-1147).

The claim was unliquidated, and no interest was recoverable, and the jury should have been so instructed.

The Trial Court in its charge instructed the jury that:

> "You may allow the plaintiff interest at the rate of 6% per annum from the date of defendant's breach of the contract, up to today, upon that portion of plaintiff's damages which was at the time of the breach capable of being definitely ascertained by computation."

In giving this instruction, the Trial Court seems to have followed the rule laid down in *Sedgwick on Damages* (9th Ed.), Sec. 313, but this case has been held not to apply to the recovery for labor and materials furnished under a construction contract or for damages recovered in an action for breach of contract, and which damages were measured in the work performed and the materials furnished.

The rule adopted by the Court is:

> "SEC. 313. Damages capable of computation. New York rule.—A rule has been established by the Court of Appeals in New York in the leading case of *Van Rensselaer* v. *Jewett* (2 N. Y., 135), namely, those cases where the amount can be ascertained by computation, together with a reference to well established market values. In such cases interest will be allowed."

But Sedgwick, himself, points out that this rule is not applicable to construction cases.

Interest is not allowed on damages for a breach of contract in building and construction cases, until they are reduced to a verdict or judgment.

Delafield v. *Westerfield,* 169 N. Y., 582; affg. 41 App. Div., 24.

McMaster v. *State of New York,* 108 N. Y., 542.

Merritt & Chapman Co. v. *Morris & Cummings Co.,* 137 Fed., 780; 70 C. C. A., 356.

Stephens v. *Phoenix Br. Co.,* 139 Fed., 248; 71 C. C. A., 356.

Excelsior T. C. Co. v. *Harde,* 181 N. Y., 11.

Stannara v. *Robert Reid & Co.,* 118 App. Div., 304; affd. 195 N. Y., 530.

O'Reilly v. *Mahoney,* 123 App. Div., 275.

American-Hawaiian Eng. & Cr. Co. v. *Butler,* 17 Cal. App., 764.

General Supply & Cr. Co. v. *Goelet,* 149 App. Div., 80.

People ex rel. Cranford Co. v. *Wilcox,* 207 N. Y., 745, 746.

Beckwith v. *City of New York,* 121 App. Div., 462.
Markham v. *Stevenson Br. Co.,* 111 App. Div., 178; affd. 188 N. Y., 593.
Mansfield v. *N. Y. Cent. Ry. Co.,* 114 N. Y., 331.
Thatcher v. *N. Y. W. & B. R. R. Co.,* 153 App. Div., 186.
Tradesman's Natl. Bank v. *Boldt,* 155 App. Div., 72.
O'Heron v. *American Br. Co.,* 177 Ill. App., 405.

Where amount due depends upon construction of contract and upon questions of fact about which there might reasonably be a difference of opinion, no interest will be allowed.

Midtown Cr. Co. v. *Goldslicker,* 165 App. Div., 264; 150 N. Y. Supp., 809.
Wright v. *City of Tacoma* (Wash.), 151 Pac., 837, 844 (Supreme Court of Wash., 1915).
2 *Sunderland on Damages,* 3rd Ed., 321.
Cox v. *McLaughlin,* 76 Cal., 60.
City of Chickasha v. *Hollingsworth* (Okla.), 155 Pac., 859.

"Where no price is agreed upon for goods or services, and the plaintiff recovers on a *quantum meruit* or *quantum valebant,* we have an unliquidated demand."

Sedgwick on Damages, 9th Ed., Sec. 312.

In the case of an action by plaintiff against defendant for damages from breach of contract, the question is not alone whether or not the "damages were at the time of the breach capable of being definitely ascertained by computation," but

whether or not the defendant could have ascertained the extent of the damages which the plaintiff might sustain from its refusal to complete its contract.

Gray v. *Central R. R. Co.*, 157 N. Y., 483, 486, 487.

No recovery can be had for interest unless the means are accessible to the party sought to be charged of ascertaining the amount, by computation or otherwise, to which the plaintiff is entitled.

Mansfield v. *N. Y. C. R. Co.*, 114 N. Y., 331, 340.

Defendant sought to ascertain the amount of plaintiff's losses and was told "to go to hell" (pp. 251, 385, 439).

The recovery in this case is for damages (Complaint, pp. 8-11, 27-28), for the breach of a contract. Said damages were indeterminate, unliquidated and might have been anything that the jury had assessed and brought in as a verdict. The verdict is in a lump sum (p. 33), and there is nothing in the verdict or the charge by which this Court can determine what items were allowed or by what method the jury arrived at its verdict. An inspection of the bill of particulars and of the record would lead the Court to believe that the jury had allowed to the plaintiff each and every item of its claim except that for prospective profits (p. 29), and practically in the exact amount in which each item was proven, but it cannot be positively ascertained to be so.

The claim being unliquidated, indeterminate and dependent upon the deductions and conclusions of the jury, no interest could be allowed to the plaintiff on said claims.

It is apparent from what took place when the jury came in (pp. 380-381), that the jury has awarded interest to the plaintiff in the sum of $8,609.54 (p. 381).

The judgment should be reduced by the amount of said interest, as it was not recoverable in this action.

The allowance of interest by the jury from May 22, 1912, under the instruction of the Court that:

> "In case you find that the defendant broke its contract with the plaintiff, and find a verdict for the plaintiff, you may allow the plaintiff interest at the rate of 6% per annum from the date of defendant's breach of the contract up to today, upon that portion of plaintiff's damages which was at the time of the breach capable of being definitely ascertained by computation" (p. 375),

shows that the jury made the date of defendant's breach of contract May 22, 1912. That is determinable by figuring the aggregate interest at 6 per cent., which is exactly four (4) years; which would make the breach by defendant, June 8, 1912; a date after May 22, 1912, when plaintiff terminated its contract. This was an impossible date; hence it must have been May 22, 1912.

Defendant committed no act on that day, nor omitted any act or duty.

LAW POINT XVII.

No interest can be allowed on prospective profits recovered in an action for a breach of contract.

In *Root* v. *Ry. Co.*, 105 U. S., 189, 198, 204, the Court quotes from and cites with approval the holdings in:

Mowry v. *Whitney*, 14 Wall, 620.
Littlefield v. *Perry*, 21 Wall, 205.
Parks v. *Booth*, 102 U. S., 96.

That profits are to be regarded as unliquidated damages and no interest can be allowed thereon.

> "We add only in our opinion the defendant should not have been charged with interest before the final decree. The profits which are recoverable against an infringer of a patent are in fact the compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages, and unliquidated until the decree is made. Interest is not generally allowable upon unliquidated damages."
>
> *Mowry* v. *Whitney*, 14 Wall, 620, 653; 77 U. S., 620.

Interest was allowed in the Court below on profits; in reversing that Court and disallowing interest, Chief Justice Waite said:

> "The Circuit Court, however, in rendering its final decree, added interest to the amount found by the master to be due upon

the account for profits. In *Mowry* v. *Whitney* it was held that interest was not allowable in such cases, except under peculiar circumstances. * * *

"Profits actually realized are usually in a case like this the measure of unliquidated damages."

Littlefield v. *Perry,* 21 Wall., 205, 229; 88 U. S., 205, 229.

The Court, per Clifford, *J.*, said:

"Interest on profits decreed to complainant should not have been allowed, as was decided by this Court many years ago, the better opinion being that profits in such case are to be regarded in the light of unliquidated damages, which usually do not draw interest without special order of the Court. *Silsby* v. *Foote,* 20 How., 378."

Parks v. *Booth,* 102 U. S., 96, 120.

"As a general rule, a patentee is not entitled to interest on profits made by an infringer. The reason is that profits are regarded in the light of unliquidated damages. *Parks* v. *Booth,* 102 U. S., 106."

Railroad Co. v. *Turrill,* 110 U. S., 154.

On trial, profits were found to which interest was added on appeal. The United States Supreme Court said:

"A majority of the Courts are of opinion that there was error in the allowance of interest on the profits found for complainant. That amount therefore, which is $5663.82, must be deducted."

Silsby v. *Foote,* 20 How., 378, 386.

LAW POINT XVIII.

The contradictions in the charge of the Trial Court were in themselves enough to warrant a reversal of the judgment in this case.

The Court charged that:

> "If a proper foundation was not furnished to them (plaintiff) and the Government stopped work on March 9th, and there was no reasonable prospect of their being able to begin work anew *within a reasonable time,* I charge you that would constitute on the part of the Carlin Co. a substantial breach of the contract with the Guerini Stone Co. If it was something that could be rectified *in a few days,* that would be a different matter. The contract contemplated *a delay of a few days at a time.* All large contracts must contemplate that" (fol. 1106).

It is submitted that the above instruction to the jury is erroneous and gave to the jury an unwarranted and mischievous idea of the law; that for the Court to state *that a few days only was the limit of a delay in a contract for $352,000* was going way beyond any propriety that judicial knowledge would warrant.

This charge was so specific and its effect upon the jury so apparent that it was not corrected by later instructions to the jury requested by the defendant, as

> "the contract provided for delays due to failure of defendant to provide labor and materials, and provided that defendant should

reimburse plaintiff for its loss. This shows that delays by the defendant were contemplated by the parties. That alone would not constitute a breach of the contract unless it amounted to a substantial ending of the contract. Only unusual and extraordinary delays by the defendant such as would not, under the circumstances and conditions surrounding the parties, have been reasonably contemplated or anticipated by the parties, would constitute a breach by defendant of its contract" (p. 377).

Exception was duly taken to the said charge, and it was not corrected (p. 379).

The Trial Court committed another error in its statement of the law to the effect that

> "it is impossible to foresee beforehand all the delays that may occur, but if it was evident to the parties that there would be a long delay *or an indefinite delay,* or if it was evident that it was impossible to tell when the work would be begun again, then the Guerini Stone Co. had a right to terminate the contract. They were not bound to wait around here and await the pleasure of the Government, pleasure no doubt properly exercised—as to the beginning of the work" (p. 369).
>
> "It seems that some arrangement was made between the Government and the Carlin Co. as to underpinning the work, and this was arranged somewhere about May. But if you think from the evidence that *it was not a matter of a few days,* that it was uncertain when that would be finished, then the Guer-

> ini Stone Co. had the right to do what they did on May 22d, that is, to give notice to the Carlin Co. that the contract, so far as they were concerned, was terminated and that they would hold the Carlin Co. responsible for the damages" (pp. 369-370).

To which the defendant duly excepted and for which error assignment was made (p. 379; Assignments of Error 19, p. 476; 20, p. 477).

The effect of these charges cannot be overlooked by the Appellate Court, for the Court will consider that the jury was comprised of Porto Ricans, some of them natives, and that these declarations of the Court in three different places, of *a delay of a few days*, was very pertinent and impressive, and the charge was not overcome by the later declaration at the request of the defendant.

LAW POINT XIX.

The complaint should be dismissed:

It fails to state a cause of action.

It is drawn upon a misconception of plaintiff's rights to recover.

Plaintiff has failed to make a case or to prove facts that entitle it to any recovery; or

ANSWERING PETITIONER'S BRIEF.

Petitioner's Preliminary Statement.

(REFERENCES IN PARENTHESES ARE TO MARGINAL PAGES OF THE RECORD.)

PAGE 1. Not an action *for damages for a breach* alone, but an action on several grounds (*Marginal*, pp. 8-12), viz.:

(1) Recovery of losses under paragraph 11 of contract (Clause 6, pp. 9, 17).

(2) Recovery on performance of contract for work done (Clause 9, p. 10).

(3) Recovery of damages for breach (Clauses 7-11, pp. 9-11).

(4) *Quantum Meruit* (Clause 12, pp. 10-11).

No election of remedies was made by plaintiff (pp. 118-119, 207-215). Nobody knows *how* or *for what* the jury rendered its verdict.

The defendant had a right to know what position the plaintiff took, and to take him at his written word. The Trial Court held and instructed the jury that the plaintiff *terminated the contract* (p. 370). Defendant knows of no announcement by plaintiff "that its theory was not *quantum meruit*, but damages for contract breach," or of any election of remedies.

The attorney's statement is contradicted, it would seem (at p. 115), by the attorney himself, when called upon by the Court to tell his theory of damages or recovery, and defendant's counsel pointed out several times that the Court was permitting the plaintiff to pursue several remedies at once (pp.

117-120, 123-124). The Court's charge to the jury would indicate that the trial had been pursued on several theories (pp. 374-375). Throughout the trial the plaintiff's attorney was proving the fair and reasonable value of everything.

MIDDLE PAGE 2. There is nothing to warrant plaintiff in saying the Supreme Court *sustained plaintiff's contentions.*

Petitioner's Facts.

PAGE 4. All clauses of the contract must be read together, not isolated paragraphs (pars. 6 and 11 must be read with pars. 7, 10, 1, 14, 23 and 25, pp. 12-21).

PAGE 5. The *telegram* was sent on a mutual understanding that the walls of the building were to be cast in blocks as artificial stones, and then set with joints like granite or limestone (pp. 277-280). Later it was corrected, and the parties discovered that the Government would require the artificial stone cast in place in the walls (pp. 277-280).

The plaintiff's representatives on arrival at Porto Rico could see and knew how the foundations were progressing. The contract provided that the work on the building should not start until "The building (foundations) is ready to receive his work and after he has been notified to proceed" by defendant (Clause 6, p. 15). Plaintiff should have acted accordingly and mitigated its damages.

PAGE 6. The option was mutual agreement. As to setting granite and any delays alleged, see respondents' brief, *supra,* and the delays in setting granite attributable to the plaintiff.

PAGE 7. The plaintiff himself delayed the setting of the granite and delayed his concrete work.

PAGES 8-9. The Trial Justice excluded all evidence of events after May 22, 1912 (p. 191); and charged the jury to ignore all that happened after May 22, 1912 (p. 370).

PAGES 10-13. *Re* applications and payments. Many colorful phases and clauses are invented to give a cast to the narrative which are not warranted by the testimony and exhibits. No agreement to pay $1.07 per cubic foot was ever consummated between the parties, and the witness Converse practically admitted it (pp. 151-157, bot. pp. 155-156). His testimony on direct was greatly weakened on cross-examination. He says he fully realized how much depended on his establishing an agreement as to unit prices for applications for payments (p. 157).

PAGE 11. Mr. Carlin did not testify unqualifiedly that *"at the time of this conversation on February 1 in New York he had been advised by letter* from Porto Rico that Mr. B. *had reduced this unit,"* but, on the contrary (p. 330), he says, "It may not have been by letter," by or before February 1st or 2nd, but "we received it by letter," too (pp. 330, 290). Plaintiff's attorney makes much out of a very small matter.

PAGES 12-13. Payments.—Plaintiff omits much that took place. See defendant's brief points.

PAGE 13. Statement that "defendant made a contract with Guerini to complete the work which had been included in plaintiffs' contract for $35,150" is untrue, deliberately or otherwise (cf. p. 12 with p. 458). Plaintiff's contract included not only the artificial sandstone and its backing which Guerini undertook for $35,150, but embraced also *concrete floors, roof, backing of granite* and *enclosing I-beams.*

PAGES 13-14. The plaintiff included in its outlays many things *that* were wholly unnecessary to the performance of its contract with defendant. His so-called outlays includes disbursements to set the granite, to do custom work for the public in and about San Juan, and for pleasure and mischief trips of Converse, Follett and Guerini.

PAGE 14. The proof of profits was made on the estimate of the virtual plaintiff in the case, who was most interested, and on work with which he had had no experience or familiarity (pp. 129-131, 144-148).

Petitioner's Summary of Facts.

PAGE 15. Plaintiff contracted to begin the work "when the building foundation was ready" and he was "notified to proceed" (p. 15). He figures time from his first advent at Porto Rico.

Evidence of any delays after May 22, 1912, was excluded, and jury directed not to consider it (pp. 191, 370); yet plaintiff takes the court to January, 1913.

What defendant was paid by the Government is no concern of plaintiff.

PAGE 16. Defendant has compared plaintiff's alleged expenditures for superintendence with the labor and transportation and other disbursements with the actual value of work completed (Brief, *supra*, Points V and VI).

PAGES 18-19. The argument is steeped in disappointment, and is made with closed eyes.

PAGE 20. The decisions are on different records, and quite a different state of facts. The decisions are reconcilable.

Answering Petitioner's Point II.

PAGE 21. The estimated delay by Follett was immaterial and excluded by Trial Court's charge (p. 370). Plaintiffs were ordered to proceed with their work February 3 (p. 456) and April 3, 1912 (Exhibit P, p. 439).

The Trial Court held that plaintiffs had waived any delays in providing granite prior to September 25, 1911 (p. 376).

PAGE 22. Plaintiff had no orders or authority to proceed with work until foundations were ready to receive it, except preparatory work (pp. 15, 279-280). Testimony shows plaintiff delayed the granite setting (Point II).

PAGES 22-23. Plaintiff's statement of delays are erroneous and unwarranted.

PAGES 23-24. The plaintiff's attorney is blind. He cannot distinguish the ruling by the Supreme Court, that paragraph 7 of the contract "cannot properly be construed to deprive plaintiff of his right under paragraph 11, *to reimbursement* for losses *attributable to delays* assumed by the contractor," from the ruling of the Circuit Court of Appeals, that paragraph 7 must be read with paragraph 11, in determining whether the plaintiff was justified, as a matter of law, in terminating its contract for delays mentioned, embraced, contemplated and provided for in paragraph 7; and this is so notwithstanding the lower Court takes pains to distinguish and point out the difference.

The defendant cannot be deprived of the protection of paragraph 7 any more than can the plaintiff be deprived of paragraph 11 and reimbursement for losses caused "by delay to the material progress of the work" (pp. 17-18). Paragraph 7 is very material to the question of delays "in the prosecution

or completion of the work by *neglect, delay or default* of the owner (Government), the architect, the general contractors (defendants), or any other contractors employed by them upon the work, or by alterations," etc., "then the time for completion * * * shall be extended," etc.

While this clause may not affect the right to reimbursement for losses from delay * * * it does materially affect the right of plaintiff to abandon or terminate the contract. The time for the performance and completion of the work (the contract period) is expressly extended "for a period equivalent to the time lost by reason of any and all of the causes aforesaid" (p. 15). The defendants were to "award and certify * * * the additional time to be allowed." Delays were in contemplation of the parties and they had notice that the Government contemplated them (*infra*, Point XV).

PAGE 25. Respondent says that this Supreme Court "held that paragraph 11 imposed on the general contractor *an absolute obligation* to provide all labor and materials * * * in such manner as not to delay the material progress of the work," and that "from the *absolute breach* of *this absolute obligation*, the ordinary contract rights and remedies should arise." This is pretty strong language; but it is respondent's understanding that instead of *an absolute obligation*, the Court held it was conditional on defendant's reimbursing the plaintiff, and that the contract virtually provides that the defendant may delay the work if he (it) reimburse the subcontractor for his losses during the delay (pars. 11 and 7); that the measure of plaintiff's damages *for delay is reimbursement for his losses during the delay;* and *which losses* the plaintiff-petitioner *must mitigate* so far as is possible.

The trouble with petitioner is that he wants to be rid of his contract, and to create a situation which contract clauses 11 and 7 were intended to avoid and prevent.

The respondent may not be deprived of the protection of its contract, and if its provisions that delays may be anticipated and that the contract period be extended, and the actual *losses during delay reimbursed.*

On page 279 the Supreme Court did *not hold* that paragraph 7 did not cut off plaintiff from the right "to recover damages or money compensation." The words quoted are those attributed to the Trial Judge at the former trial. All the Supreme Court says is, "Paragraph 11 must be enforced as it is written. Paragraph 7 cannot properly be construed to deprive him (plaintiff) of his right under paragraph 11 *to reimbursement for losses attributable to delays* by the general contractor," and that is the contention of defendant-respondent.

PAGE 26. The petitioner assumes too much. The Supreme Court was passing upon the error submitted to it, and confined its opinion *to the error*, setting out clearly that the charge as to damages *was erroneous.*

The plaintiff is evidently placing the defendant's breach now from March 9 to May 22, 1912, as it must. How it can say it terminated its contract or justify the termination by what occurred after May 22, 1912, is difficult to understand.

April 3rd the defendant ordered the plaintiff to proceed on April 17, 1912 (Record, p. 439). Plaintiff neglected and refused to proceed.

There was no delay after that. The plaintiff terminated and rescinded its contract May 22, 1912. The plaintiff cannot talk about what occurred after May 22, 1912, for it had obliterated

itself from the contract and the job. *What might have been done if the plaintiff had not terminated the contract* cannot be considered (Record, fols. 570-576).

Plaintiff did not face "a delay of eight months before it could begin on the remaining 75% of its work." That was at most *a mere guess,* or, as the witness characterizes it, "I estimated five months" at the time he sent his men north (April 3, 1912) (p. 43), when he had a letter in his hands from defendant, ordering him on with the work, over one-half the building for April 17, 1912 (p. 439). The witness says, "Nobody knew how long the investigation of March 9th would go on or continue; that would be a matter of estimate" (p. 83). The plaintiff had not completed 25 per cent. of its work, nor 10 per cent of it. It had done *25 per cent. of the yardage* of concrete, but only the cheapest and easiest concrete, in the basement. No artificial stone front whatever had been cast, no ornamental work.

The only question is: What had occurred up to May 22, 1912 (pp. 190-192)?

If the facts are undisputed, as they are between March 9 and May 22, 1912, then the question of a breach by defendant is solely a question of law for the Court (Plaintiff's Brief, Points III*a* and III*b*).

Plaintiff, in its letter of April 25, 1912 (p. 399), says, "The last check you gave us was on the basis of what *you thought the work ought to cost*, which, of course, is of no force under the contract." But the United States Supreme Court held that it was of force; that the defendant was not obliged to pay precisely 85 per cent. of the cost of the work; the use of the words "not to exceed" forbids this; that the plaintiff was not to be the sole judge of the amount it was entitled to receive; that, on the con-

trary, the contract provisions *contemplated that the defendant "was to be afforded an opportunity to verify the propriety of the demand made."*

The letter of April 25, 1912, is a breach of the contract by plaintiff under the case of *Michigan Yacht Co.* v. *Bush,* 143 Fed. Rep., 929.

Plaintiff in its letter of April 25, 1912, does not mention its alleged agreement at $1.07, though it does say, "We have not been paid in accordance *with the terms of the contract,* and although we have endeavored to establish some definite methods to have the payments come to us regularly and *on some basis mutually satisfactory,* you have each time changed your basis of calculations" (p. 399).

Is this the way a man would write who had a hard and fast agreement for $1.07 per cubic foot for concrete?

The argument by plaintiff's counsel is interesting, to say the least, and it is very suggestive of what the verdict shows, viz., that plaintiff is looking for and expects this Court to aid the plaintiff in getting *more* from defendant *than the damages* which it suffered by reason of delay. What else is plaintiff entitled to, except the damages it has suffered?

What has defendant to do with plaintiff's plans to do business in Porto Rico, or the manner, means or methods of conducting its business? Defendant contracted for certain results of plaintiff's operations, for which it was to pay.

What if there was a delay of months? The plaintiff would recover its losses, whatever they were, and would be indemnified. They could shut up shop and go to the States as they did on April 3, 1912; all losses, interest charges, increase in price of labor and materials, etc., would have been recoverable. The contract was equitable, was agreed to by the parties, and they were bound by it.

The proposition that "the provisions in Par. 11 (of the contract), *for reimbursement for delays* is simply a statement of what the law would imply in the absence of such a provision," is just the kind of an admission that defendant is pleased to have from plaintiff. That is what defendant contends for, and *what the Supreme Court held,* that "Par. 11 binds defendant *to reimburse plaintiff for any loss caused by delay resulting from defendant's failure* to provide materials not included in the contract"; that Par. 7 "cannot properly be construed to deprive him (plaintiff) of his right under Par. 11 to reimbursement for losses attributable to delays assumed by the General Contractor" (240 U. S., 278-279); and that was the law laid down for this case. All the rest of the decision or opinion is given to the consideration of errors of the Court in excluding evidence of profits and in its instructions to the jury under the facts proven at the first trial. The Supreme Court could not have been more explicit in its directions and pronouncement of the law. The Supreme Court also significantly calls attention that the measure of damage under the *Behan* case could be *assumed it ought to have been granted* only "upon the theory that the contract was rightfully terminated by notice of May 22, 1912," not upon a *findng of the jury* that it "was rightfully terminated," but upon a *theory or a ruling* (240 U. S., 282-283).

Under *assumed facts* not in the case the Court *assumes it ought to have been granted,* and the plaintiff banks his whole argument on that remark.

PAGE 27. Plaintiff's argument is on the presumption that the Supreme Court was digesting and elucidating the entire case for the benefit of plaintiff-respondent.

PAGE 29. The defendant was *not* to be strictly held to its obligation not to delay, but it was to "reimburse the losses attributable to delay"—that is the covenant in paragraph 11. *It certainly is contended* that no such absolute and definite obligation *not to delay* existed. The parties contemplated and anticipated the situation that arose and provided what should be done and what measure of damages should apply, viz., *reimbursement for losses due to delay.*

PAGES 30-31. These pages present new points not raised in the Circuit Court of Appeals nor by the petition for writ of certiorari. No suggestion has heretofore been made that the instruction was not clear and the exception well taken. The Trial Court fully understood defendant-respondent's position, for it had been maintained throughout the trial (pp. 210, 114-115, 117, 123, 126, 191, 194, 199; Law Points VI, IX, XV; Assignments of Error in Brief, I-V).

PAGE 31. There is no inconsistency in the charges Nos. 7 and 19 proposed by defendant. Both should have been given, and the Trial Court should have determined as a matter of law that the delays complained of were within the contemplation of and anticipated by the parties. They are expressly recited in paragraph 7.

Both parties had copies of the Government contract and specifications (pp. 287, 412), and they expressly mentioned the alleged delay due to defects in the foundations (pp. 29, 362, 412).

PAGE 33. The plaintiff's attorney accepted the Trial Court's grant of "an exception is allowed *each party to each* charge given at the instance of the opposite party, and to both parties to such charges as were requested by them and refused by the Court" (p. 377).

Both attorney for plaintiff and defendant's trial counsel left by permission of the Trial Court before the charge was finished in order to catch the return boat to New York, hence the allowance of the exceptions, as stated by the Court (p. 378; see also the several exceptions by Attorney Dexter on behalf of the defendant, p. 379).

The point is first raised here, and was not made in the Circuit Court of Appeals nor in the petition for a writ of certiorari. The facts are that both the plaintiff's and defendant's requests to charge were under consideration by the Court, and had been submitted to the Court for more than twenty-four hours prior to the charge to the jury. The Trial Court had full time to consider the exact propositions of law contained therein, and modify them or make any changes therein that it desired.

PAGE 33. The plaintiff's remarks about the sixth instruction requested by defendant are not understood, nor how they apply to the matter under discussion. Evidently the sixth request is for an instruction that if the contract was rescinded, recovery could be had under a *quantum meruit,* which is the law and which was decided in the *Behan* case. Defendant's counsel does not agree that it is contrary to the law of the case as laid down by the Supreme Court.

In *the case at bar*, the United States Supreme Court has held that it was error to exclude from the consideration of the jury the question of profits *on the ground that the profits were contingent and speculative,* and the Court says:

> "No more definite or certain method of estimating profits could well be adopted than to deduct from the contract price the prob-

able cost of furnishing the materials and doing the work."

Gucrini Stone Co. v. *Carlin*, 240 U. S., 264, 280.

The determination of the United State Supreme Court that damages were *not contingent and speculative,* and therefore were *ascertainable,* removes the case at bar from the line of cases headed by *U. S.* v. *Behan,* 110 U. S., 338, permitting the recovery of disbursements in preparation to do work as damages for breach when damages are contingent and speculative or impossible to ascertain.

The plaintiff one moment relies upon the case of *U. S.* v. *Behan,* and the next moment repudiates it. The case holds that:

> "When a party injured by the stoppage of a contract elects to rescind it (terminate it), then it is true he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed, as upon a *quantum meruit.* There is then no question of losses or profits."

The Court will note that it is *not an election as to what damages he shall sue for,* but, in the words of the Court, *"when a party injured by the stoppage of a contract elects to rescind it."* Plaintiff in this case elected to rescind or terminate the contract.

U. S. v. *Behan,* 110 U. S., 338, 345.

Pence v. *Langdon,* 99 U. S., 578, 581-582, holds that an "election to rescind or not to rescind, once made, is final and conclusive." The act of rescission is what determines the relation of the parties.

The plaintiff having terminated (ended or rescinded) the contract, there is no contract so far as he is concerned, and he must *elect* to take and recover under a *quantum meruit, i. e.,* the reasonable value of his work, independent of the contract.

Answering Petitioner's Point III.

PAGE 34. Plaintiff's Point III, with respect to applications or requisitions for payments, is based likewise upon assumptions, presumptions and intendments of plaintiff's attorney. Progress payments were to be made "not to exceed in amount 85 per cent. of the cost of the work actually erected in the building." The Supreme Court and the Circuit Court of Appeals pointed out to the plaintiff that his requisitions were not *based upon the cost of the work.* The proof is that they were based upon a unit price which the Government had temporarily allowed to the defendant, and which the plaintiff's president conceded was greatly in excess of the cost or the reasonable value or the contract value of the work (pp. 154-156). Converse, who represented the plaintiff, says in his testimony that he realized that he would be greatly overpaid for the concrete work if paid at the rate of $1.07 per cubic foot; that he did not expect to be paid at that rate for the whole of it, but for the first part only; that he did not expect to be paid $1.07 per cubic foot for the concrete that was put in the building, because he knew there would come a time when that would be shown to be too high a figure, and it would run over his contract price; that he knew how much at the time, and that while his contract price for all the work was only $64,750, he would be receiving at that unit price of $1.07 an amount of $107,000 (pp. 152-153).

None of the applications or requisitions of the plaintiff to defendant were made in accordance with the contract, and that is conceded by the plaintiff's witnesses (pp. 166-167, 289-292). There were no contract unit prices, and the payments were to be made not of quantities in the unit prices, but instalments of a lump sum of $64,750 (pp. 18, 21). The applications or requisitions and the payments were to be instalments of the contract price, and were to be measured in the cost of the work actually in place.

The requisition itself shows that it is to be for work *completed to date*, and the testimony shows that neither the concrete nor the granite was completed in accordance with the specifications (pp. 424-427), in that the concrete *was not stopped and cleaned and the surfaces were not free from spots, stains, ridges, pits, scales and other defects*, all mentioned in the specifications, and the stone work (granite) had not been thoroughly *cleaned and the joints raked up or pointed*, and none of the work had been *accepted or any satisfaction expressed* by either the architect or the defendant, which was *a condition precedent* to the ultimate completion of the work or to payment therefor.

The contract makes the performance and completion of the work to the satisfaction of the Government architect and the defendant a condition precedent to any payments for work done or materials furnished (pp. 12, 21), and the contract expressly provides that though the work be done under the inspection of the defendant, and even though payments be made under the contract, that it shall not be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work (p. 19).

It is submitted that the defendant is at all times entitled to the protection of its contract and of the express terms contained therein, and that the plaintiff must not only allege in its bill or complaint the performance of conditions precedent, but it must prove them, neither of which has it done in this case. The plaintiff offered not one particle of evidence of the completion of its work in accordance with the specifications, nor to the satisfaction of the architect or the defendant. Such proof cannot be implied, nor are there any authorities to that effect.

The defendant requested the Court to charge that:

> "26. Plaintiff was not entitled to any monthly or progress payments until it had complied with those terms of its contract which entitled it to payment. The contract between the parties required as a condition to payment that the work should be to the satisfaction and under the direction of the defendant and the architect, and agreebly to the drawings and specifications.
>
> "Plaintiff must show and prove that the work was performed to the reasonable satisfaction of the defendant and the architect before they are entitled to payments on account."

which request was refused (p. 361; Assignment of Error 53, p. 489; Exception, p. 377)

PAGES 35-36. The question of the inclusion of granite setting in requisitions was not passed upon by the Supreme Court in its decision.

PAGES 36-37. Whatever may be said of general provisions applicable to the concrete work and to the granite work, there can be no question that the subject of payments, as provided for in the contract, is *limited strictly to the contract price of $64,750* for concrete work, and said lump sum contract price embodies no part of the granite setting (pp. 18, 21).

PAGE 37. The quotation from paragraph 25 of the contract can refer to nothing but *the same lump-sum contract price* aforesaid, and it cannot be extended to anything else. The said provision does not *immediately* follow the part of the agreement referring to granite setting.

PAGE 38. There is nothing whatever to indicate that the provision for payment obviously is intended to apply to *all the work* embraced in the contract, unless, indeed, plaintiff's attorney wishes to concede that the granite setting was included in the lump-sum price of $64,750. Undoubtedly he would be loath to concede that. In his argument he is merely begging the question. To read the contract as plaintiff's attorney urges would do violence to the English language, and the plaintiff must bring itself within the language of the contract, whether it be repugnant to plaintiff's ideas or not. There is nothing in the contract that warrants the statement of

> "an express stipulation *that the work* will be paid for at the time and in the manner and upon the conditions above set forth."

The contract expressly provides that it is *the price* that is to be paid at the time and in the manner and upon the conditions set forth.

Answering the statement that

> "the construction adopted by the Circuit Court of Appeals has never been suggested by any judge or any lawyer in the history of this litigation, until the Circuit Court of Appeals handed down this decision,"

the Court's attention is called to defendant's Law Points XI, X and IV.

PAGES 38-39. What plaintiff's attorney says with respect to questioning the applications or requisitions during the building operations or during the trial might *under some circumstances* be material; but *here* the plaintiff seeks to take advantage of a situation and to terminate or abrogate its contract, which it did and which it now attempts to justify. To warrant such an act the plaintiff must have brought itself distinctly and strictly within the terms of the contract, and to justify such an act the defendant must be put in a position where it has no excuse for the non-payment of the moneys claimed to be due within the strict terms of the contract.

As if not quite satisfied with the grounds which he has presented, plaintiff's attorney finally says that Mr. Converse says,

> "Mr. Carlin told Mr. Converse to put the amounts, both of concrete and granite, on the requisitions for monthly payments,"

and he then quotes from the testimony. The quotation from the testimony, however, recites that he (Carlin) requested that the information as to *the quantities of concrete and granite should be put in a separate letter,* because his application or requisition form did not call for these units, figures or

quantities, which is directly *contra* to the statement made by plaintiff's attorney. Mr. Converse does not say that Mr. Carlin told him that "on the blank itself I was to put the amounts," but that is Mr. Converse's own conclusion, and the requisitions themselves, Exhibits 13 and 18, show no separate amounts for the granite setting, although it is enumerated in square feet at a unit price, but Exhibit 19 is the letter which concludes "we enclose herewith formal application," stating the number of cubic yards and square feet of concrete and granite. The statement is characteristic of the delicate and skillful handling of the English language, the effect, if not the purpose, of which is to deceive the Court.

PAGES 39-41. Defendant denies that the requisitions were made "in exact conformity with the instructions of defendant's representative," and repeats that there is no covenant or promise in the agreement to pay in accordance with said applications or requisitions. That, on the contrary, payments were to be made *"not to exceed 85% of the cost of work actually erected in the building,"* and that this Supreme Court has pointed out in its opinion that

> "the language cannot be construed to oblige the general contractor to pay precisely 85% of the cost of the work done; the use of the words 'not to exceed' forbids this. The paragraph must receive a reasonable construction, and undoubtedly required the general contractor to make substantial payments monthly, fairly approximating but not exceeding 85% of the cost of the work. But the proviso requiring the subcontractor to furnish to the general contractor a written

> requisition did not entitle the subcontractor to be the sole judge of the amount it was entitled to receive. On the contrary, the provision that the requisition should be submitted 'not less than twelve days before the payment is required' evidently contemplates that the general contractor was to be afforded an opportunity to verify the propriety of the demand made. But the evidence fails to show that the requisitions were based upon the cost of the work."

From this opinion it would appear that the question of the sufficiency, contents and form of the requisitions or applications had been the subject of controversy and litigation from the beginning of the trials through the United States Supreme Court, and that the plaintiff's attorney had endeavored *to qualify his requisitions at the last trial*, but had failed. The question of whether the requisitions were regular and strictly in accordance with the contract was for the plaintiff's attorney to attend to and *to comply with at his peril* if he was going to rely upon the failure to make payments in accordance with his requisitions the ground for *terminating his contract.*

Requests for instructions Nos. 26 and 27 raise the issue, and they were refused.

While the statement of plaintiff's attorney that "no *exception* was taken to the admission in evidence of these requisitions" is strictly correct, defendant's counsel did object to the admission of said application for payment, Exhibits 13, 18 and 19, and said exhibits were specifically limited "merely as a notice that he applies for that amount of money" (pp. 96-103). The subject of these applications or payments on requisitions was brought up

not only in the manner above recited, but by requisitions Nos. 13 (p. 357), 26 and 27 (p. 361), and under motion for *direction of a verdict* or *motion to dismiss* (pp. 215, 218).

Was not the contract terminated by plaintiff because defendant would not make "what *the plaintiff considered a proper adjustment*" (pp. 66-67)?

Answering Petitioner's Point IV.

PAGE 42. No practical construction was placed upon the contract terms as to requisitions or payments and no unit prices were *adopted* by the parties. On the contrary, the defendant's proposed unit price was rejected and repudiated (pp. 103-104, 289-294). No payments were ever made in accordance with it (pp. 289-294). The work was not completed and the plaintiff was not progressing with his work. The application submitted or requisition made was at $1.07, or three times *the cost* or reasonable value of the work (pp. 152-158, 289-292).

The price of $1.07 per cubic foot was not proven; it is *contra* the contract, which says the "monthly payments on account shall *not exceed in amount 85% of the cost of the work actually erected in the building*" (p. 18); there is *no consideration* for such *an increase* in payments; and it is not shown that work was *performed and finished* to the *satisfaction* of defendant and the architect, but to the contrary (pp. 294, 242, 334); no new contract was pleaded, nor any modification (pp. 10, 28, 30, 46). These points were raised by defendant's objection and exception when the evidence was introduced (pp. 97-98; Request 18, p. 359; Assignment 49, p. 487; Specification VIII [d], [e], [f], pp. 49-50).

The Supreme Court's reference and statement that *"such details as were furnished do not seem to bear out the estimate"* were very significant and meant more than the *mere quantity;* if the Court had in mind the *quantities,* it would have said so. The Court criticizes the application or requisition for the reason that it was not *"based upon the cost of the work, or that any clear statement of such cost was submitted with them."*

PAGE 43. The comments of the Supreme Court on the former record of a former trial are not pertinent where the testimony was very much limited. Defendant cannot agree with plaintiff's attorney in his declaration (bottom p. 43 of his Brief) that the proof being the same in the two trials or that the price of $1.07 was ever adopted or used (Brief, *supra,* Point III a).

PAGE 44. There was no practical construction. The price of $1.07 was submitted and rejected. The contract provided that monthly payments should not exceed "85% of the cost of the work actually erected in the building." There is no requirement that the payment should be equal to or the same as the written requisition. The requisition might be *anything;* but, as this Supreme Court said in its opinion, "On the contrary the (contract) provision * * * evidently contemplated that the general contractor was to be afforded an opportunity *to verify the propriety of the demand made."* The contractor was required "to make substantial payments monthly, fairly approximating, but not exceeding 85% of the cost of the work done," viz., "85% of the cost of work actually erected in the building" (p. 18), and that was done. What plaintiff wanted and insisted upon was what defendant had primarily received from the Government (p 154). though

he knew it was excessive (pp. 152-153) and ridiculous (p. 154), and would give him a sum greatly in excess of his contract price (p. 153), and that the Government had reduced the defendant's estimates to 35 cents, less than one-third the price plaintiff demanded (pp. 156-157), though he repeatedly said he wanted only his contract price (pp. 166-167). The first requisition was based on the cost of the work, says Mr. Converse (p. 159), but it was evident that Mr. Converse was looking for his losses and expenses in the $1.07 per cubic foot (pp. 166-167, 103-104, 106) of concrete.

PAGE 44. There is not a suggestion in the record that any evidence of the agreement for $1.07 per cubic foot was received "as a practical construction" of any terms of the contract. Such a statement is *contra* to the charge or instruction quoted in plaintiff's brief on the same page. It is not a matter of ambiguity, but an attempt to vary the terms and modify the provisions of the written contract, and without pleading the same or proving any consideration. No question of any practical construction. It was all one-sided, on the part of the plaintiff, no acquiesence or conduct of defendant to base any practical construction.

PAGE 45. It is surprising that plaintiff's counsel should consider an objection to the modification of a contract, upon which modification he hopes to base his right to terminate the contract, because it is not pleaded, *as very technical, indeed* (p. 97). It had far-reaching consequences and made a new agreement. He did not even ask the Trial Court for permission to amend his pleadings (pp. 97-98).

Answering Petitioner's Point V.

PAGE 46. When this case was before this Court before, defendant never heard of any claim *"that an improper* measure of damages had been applied by the trial Court," but that point was that *no damages at all were allowed for delay,* because the Government contract was deemed to be embodied by reference in the contract between the parties, and the Government contract *reserved the right to suspend any portion of the work* (p. 412). The opinion of the Supreme Court so holds.

All damages were precluded if the Government contract had been a part of the contract between the parties.

PAGE 47. The plaintiff assumes too much. He cannot realize that the Supreme Court has expressly stated in its opinion that the measure of plaintiff's recovery for delays in this case is under paragraph 11, which "binds defendant to reimburse plaintiff for any loss caused by delay resulting from defendant's failure to provide materials (foundation) not included in the sub-contract," and that paragraph 7 "cannot properly be construed to deprive him (plaintiff) of his right under paragraph 11 to reimbursement for losses attributable to delays assumed by the general contractor."

There was no cure for such a charge as was given by the Trial Court. It was near the end of the Court's charge and was the last impression and direction that the jury had. It was cumulative and added to what had long preceded it (p. 364).

PAGE 50 (top). There is a vast difference between the measure of damages as charged by the Trial Court and given by the Court of Appeals. The Trial Court's is *cumulative* and the Court of Appeal's is *reductive*. Under the several causes of ac-

tion many elements of damages were permitted to go to the jury.

The Supreme Court did not lay down any instructions or mandate to the Trial Court. Defendant has fully discussed what the opinion of the Supreme Court *did* and *did not* decide. It is expected that the Supreme Court's decision will be followed, but not as to the *measure of damages* contended by plaintiff as under the *Behan* case, nor as to the effect or result of withhholding a payment or part of a payment contended by plaintiff, nor as to ignoring the Supreme Court's repeated statement that:

> "Par. 11 binds defendant to reimburse plaintiff for any loss caused by delay resulting from defendant's failure to provide materials not included in the sub-contract" or "to reimbursement for losses attributable to delays assumed by the general contractor."

Wtihout doubt, *extensive delays* or, per words of the contract, *"to delay the material progress* of the work," were contemplated by the parties. The delays had *"to delay the material progress* of the work" to give plaintiff any right to his losses, per the contract (par. 11, p. 17).

Notwithstanding the fact that the Supreme Court held that the refusal of the instruction was *no error,* and that such an instruction *might mislead the jury,* the Trial Court gave the instruction verbatim to the jury (p. 374), to which exceptions (p. 379; Assignment 30, p. 481, and Spec. IV [k]) were each taken. In the exception, defendant's attorney expressly designates the part excepted to as what "the Court read from the case of *U. S.* v. *Behan,"* and in other ways (p. 379).

Applying the measure of damages given by the Trial Court to the jury, the plaintiff would recover (the figures are fictitious):

(1)	The expenditures (total)		$35,000
(2)	Losses incident to delay, as bond, insurance, excess superintendence, overhead charges, travel and transportation, deterioration, etc. (pp. 29, 150-151, 124-126, 195-203)		3,000
(3)	Work performed (p. 395):		
	Concrete	$5,700	
	Granite	1,300	7,000
(4)	Work completed (to satisfaction of architect and defendants)		.....
			$45,000
(5)	Profits		10,000
			$55,000

It is apparent that the items (2), (3) and (4) are a part of, and have been allowed to plaintiff in (1), and are in part duplication thereof. The charge is certainly misleading. The expenditures include work and material or all of (3); also bond, insurance, superintendence, transportation and maintence or all of (2); and (4) is a part of (3). Certainly such a charge more than *duplicates* the damages, it *manifolds* them.

PAGE 50. It may be true that neither party in its specific requests for instructions did not embody the Trial Court's charge, but the plaintiff did during the trial, and when the Trial Court asked plaintiff's attorney *"to tell me his theory of damages,"* read in its entirety and *haec verba* the charge given by the Trial Court, as his *theory of damages* (Rec-

ord, p. 115). Plaintiff presented his action for damages on that theory, and defendant throughout the trial objected to the testimony on the ground that it was *not the correct measure of damages.* Plaintiff took no exception to the charge of the Trial Court in respect to damages.

The plaintiff seeks to have a measure of damage applied, *on the assumption* that it ought to have been granted had it been confined to a special case, which was not the case.

The Court of Appeals says the charge made by the Trial Court "*embodies a duplication* of elements" of damage, "and is misleading," which is true.

It is *not necessary* in taking an *exception* to specify in making exceptions to Court's instructions that "duplication of elements are embraced, and that it is misleading."

PAGE 50. How does plaintiff's attorney know to what defendant's exceptions were directed? The defendant's counsel throughout the trial objected to the testimony as not the proper measure of damage (*supra*, Specifications of Error V*a*-V*i*).

PAGE 51. The Court is supposed to know the law, and not to require specifically to be pointed out that a rule of damages adopted is a "duplication of elements and misleading in character."

PAGE 52. It is sufficient to take the *exception.* The Trial Court fully understood throughout the trial that plaintiff and defendant differed as to the *measure of damages* applicable to the case; and what those differences were.

Answering Petitioner's Point VI.

PAGE 53. Point VI, there is no proof that "defendant appropriated and used the materials and tools in completing the building. None whatever" (pp. 201-202).

The testimony as to this plant alleged to have been converted by the defendant (p. 29) was objected to "as not pleaded, and not being within the pleadings," with exception (p. 200).

PAGE 54. There is not a thing to show that the evidence was admitted "on the theory that the moneys expended for the materials, machinery and tools was money expended *in the prosecution of the work.*" On the contrary, plaintiff's attorney says, "I propose to show that defendant took it and has it," which would amount to *conversion.* He proved nothing; neither that defendant *took it or has it* * * * *or ever had it* (pp. 200-201).

The pleadings do not cover the tools alleged to have been *converted.* Plaintiff did not prove what he expended or disbursed for the tools, etc., but *"my value at the time,* $3,500" (p. 202). It was not within the pleadings. This was not "waste of material and damage to equipment, caused by delay above set forth"; it was the sub-contractor's plant on the job when he quit the work (pp. 200-202, 205-206).

PAGE 58. Lastly, *"In the interests of substantial justice,* the judgment should be reinstated," is characteristic of this whole case.

A judgment for $35,000, *with interest,* on a contract under which the plaintiff himself figured at the highest and under the most favorable circumstances, a profit of $9,738 (pp. 110-111).

The profits at most were the full value of the contract. This Supreme Court has held that the *profits*

were ascertainable, which takes the case out of the class of cases of which the *Behan* case is typical. The breach was not *in limine.* Part had been performed and paid for.

The judgment is a miscarriage of justice.

The plaintiff had performed about 25 per cent. of the yardage of concrete, but it represented only about one-seventh of the money value of the concrete work (*supra,* Point III *a*). The plaintiff had delayed the work itself (*supra,* Point II). There was no interruption of the work for any such period as *six months.* The plaintiff was ordered to proceed with its work on April 3, 1912 (Exhibit P, p. 439), which is but *twenty-four days* after the Government elected to make an investigation. The Government's operations were on a very small area of the foundations of the building which was about 100 feet wide by 400 feet long. There was no excuse for plaintiff's failure to proceed with its work in April (Points I and II, *supra*). It did not require the whole area of the foundation; and if it had, it could have proceeded without interference.

Plaintiff received all that it was entitled to, of payments, per the terms of its contract (Point III *a*, *supra*).

PAGE 59. The opinion of plaintiff's attorney of what is *"eminently just and fair"* in a verdict is that of an advocate who is severely disappointed. With a residence of several years in San Juan, Porto Rico, as the local representative of a New York firm of attorneys, with a personal acquaintance with the Court, its officers, the jury and a large part of the community, the plaintiff's attorney had reason to feel very confident of the outcome of the trial at San Juan; but his ideas of what is *eminently just and fair* and *in the interests of substantial justice,* have evidently been dimmed by his

tropical associations and his own personal interest in the case.

The judgment of the United States Circuit Court of Appeals for the First Circuit should be affirmed, with costs.

Respectfully submitted,

CHARLES HARTZELL,
Attorney for Respondent.

JOHN C. WAIT,
Of Counsel.

GUERINI STONE COMPANY *v.* P. J. CARLIN CONSTRUCTION COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 218. Argued November 7, 8, 1918.—Decided January 7, 1919.

C contracted to erect a federal building, and G subcontracted with C to build the superstructure in a specified time, to be extended to make up for delays caused by the owner, by C or by other causes specified, and C agreed to provide all labor and materials not included in G's contract in such manner as not to delay the material progress of G's work, and to reimburse G for any loss caused by failure to do so. G's work was stopped by the action of the Government in suspending the operations because of a defect in the foundation provided by C, and after more than two months there was still no prospect that G, though ready, could resume within a reasonable time. *Held*, that an agreement that C would furnish a suitable foundation so as not to delay G was imported, which was not dependent on C's fault or the rights of the Government under the main con-

tract, and that G was not confined to the remedy of time extension and reimbursement, but could treat the contract as broken and sue for the breach. P. 340.

When the complaint counts upon a special building contract, and defendant's breach in failing to provide a proper place for plaintiff's work under it, and also upon a *quantum meruit* for labor performed and materials furnished, evidence of materials, etc., left on the premises by the plaintiff at the termination of the contract and appropriated by the defendant, is admissible under the latter count, without regard to its bearing on the damages recoverable under the special contract. P. 342.

Error in admitting evidence cannot be imputed to the trial court upon the theory that a count of the complaint was waived at the trial, when the theory depends on a statement made by plaintiff's counsel in the Circuit Court of Appeals, which was inconsistent with the bill of exceptions. *Id.*

Upon the breach by the defendant of a building contract, certain tools and appliances, brought to the building and used by the plaintiff in performing the contract and susceptible of further use in completing the work, were left in place by the plaintiff and accepted and appropriated by the defendant, *held*, that their value should be considered as part of plaintiff's expenditure under the contract, in computing damages, within the rule laid down in *United States* v. *Behan*, 110 U. S. 338, 344, 346. *Id.*

Where a building contract contemplates that the contractor's ability to perform will depend upon his receiving stipulated payments on account as the work progresses, a substantial failure to pay as stipulated will justify him in declining to proceed with the work. P. 344.

A contractor agreed to do certain concrete work, furnishing the materials, for a stated sum, payable partly in instalments, and by a separate paragraph of the contract offered an option, which was afterwards accepted, to set at so much per square foot certain granite blocks, to be furnished by the other party. There was a general provision for monthly payments on account, not to exceed a certain per cent. of the cost of work erected in the building, to be made upon written requisition, and the parties subsequently agreed upon a mode of estimating concrete work for this purpose. *Held:* (1) That the acceptance of the option did not make a separate contract for the granite work and that the provision for monthly payments applied to that as well as to the concrete work, so that a requisition properly included both classes; (2) that in any event a requisition uniting demands for both classes was unobjectionable if the granite work had

been completed and the full compensation therefor had become payable. P. 345.

In an action for breach of a building contract, the complaint alleged defendant's failure to make payments upon demands made "in accordance with the contract," while the demands proved were based on a modification of the contract. *Held*, an unimportant variance not requiring an amendment, particularly in view of the relation of the matter to a former decision and mandate of this court. P. 346.

An exception to an instruction should be specific, directing the mind of the court to some single point of alleged error. P. 348.

When the grounds relied on by the Circuit Court of Appeals for reversal prove untenable, this court will consider what judgment should have been rendered in view of other assignments of error. P. 349.

241 Fed. Rep. 545, reversed.

THE case is stated in the opinion.

Mr. Edward S. Paine, with whom *Mr. Eugene Congleton* was on the briefs, for petitioner.

Mr. John C. Wait, with whom *Mr. Charles Hartzell* was on the brief, for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case is before us for the second time, our former decision being reported in 240 U. S. 264. It was an action for damages, brought by the present petitioner as plaintiff against the present respondent as defendant in the District Court of the United States for Porto Rico. Our first review was upon a direct writ of error sued out by plaintiff under § 244, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157), prior to the amendment of January 28, 1915 (c. 22, 38 Stat. 804, §§ 3 & 6). Judgment was reversed and the cause remanded for further proceedings. Upon the going down of the mandate a new trial was had, resulting in a verdict in plaintiff's favor

for substantial damages. To review the judgment entered thereon, defendant, under the Act of 1915, prosecuted a writ of error from the Circuit Court of Appeals for the First Circuit, setting up assignments of error based upon rulings of the trial court in admitting and excluding evidence and in giving and refusing instructions to the jury. The Court of Appeals reversed the judgment and ordered the cause to be remanded for further proceedings, 241 Fed. Rep. 545; and to review this judgment the present writ of certiorari was allowed, 245 U. S. 643.

The controversy arose in the course of the construction of a federal post office and court building at San Juan, Porto Rico. Plaintiff had a sub-contract for a part of the work under defendant, which was the general contractor under the Government of the United States. Pertinent clauses of the contract and a general history of the case were set forth in our former opinion and need not be repeated at length.

The evidence at the second trial followed the general lines of the first. Defendant was to construct the foundation complete to the basement floor. Upon this, plaintiff was to construct the principal part of the building, including exterior and interior walls, floors, and roof, to be built of concrete. For this work and the necessary materials defendant agreed to pay to plaintiff the sum of $64,750 in certain monthly instalments on account and the balance on completion. The plans called for certain granite work, for which defendant was to send the cut blocks from the United States; and under an option set forth in paragraph 25, afterwards accepted by defendant, plaintiff was to set this granite for 40 cents per square foot of surface.

It appeared that after the work had been in progress for some time a disagreement arose between the parties about payments on account. Paragraph 12 of the contract provided that there should be "monthly payments on

account, not to exceed in amount 85 per cent. of the cost of the work actually erected in the building, provided that the sub-contractor furnishes to the general contractors a written requisition, on a form to be supplied by the general contractors, not less than twelve days before payment is required," etc. The contract, however, did not provide how such cost of the work, other than the granite setting, should be ascertained. In December, 1911, and January, 1912, plaintiff made written requisitions which were not complied with; and, according to plaintiff's evidence, it was agreed between the parties on or about February 2, 1912, that future applications and payments should be made upon the basis of a schedule which specified, *inter alia*, "Exterior and interior concrete walls, arches, and cement work $1.07 per cubic foot." On March 9, 1912, plaintiff made a requisition for payment computed on this basis, and showing a balance due of $11,735.95. This requisition was in effect refused, and no further payment was made except the sum of $674, which was paid a few days later.

In the month of February, 1912, the government superintendent of construction found a serious settlement in the foundation, as a result of which work upon the building was ordered to be stopped. This order was communicated verbally by defendant's representative to plaintiff's agent at San Juan on the 9th of March, and was confirmed two days later by letter, in which, however, a request made by plaintiff's agent for instructions as to what should be done with plaintiff's force of men pending the suspension of the work was evaded. Plaintiff stopped work pursuant to defendant's notice, and did nothing more upon the building.

Thus matters remained until May 22, 1912, plaintiff in the meantime having received no payment pursuant to its requisition of March 9 beyond the small sum mentioned above, nor any instructions or permission to pro-

ceed with the work upon the building; and, according to plaintiff's evidence, it was impossible to tell when the work could proceed. On May 22 plaintiff wrote to the defendant referring to the stoppage of the work and to "the very considerable cost and damage to us caused by your breach of contract," to the inability to get payments from defendant in accordance with the terms of the contract, and to defendant's refusal of an offer of arbitration and refusal of "an assurance that even now we would have an opportunity within any reasonable time to proceed with our work," and concluding with this notification: "Under these circumstances and owing to your entire failure to comply with the terms of the contract, we hereby notify you that we now terminate the contract and shall proceed no further with the work, and that we shall hold you liable for the damages we have sustained by reason of your breach of contract, including your failure to provide labor and materials not included in the contract with us in such manner as not to delay the material progress of our work and your failure to make payments in accordance with the terms of the contract, and all other breaches of contract on your part."

The principal ground of action was based upon the contention that in refusing to respond to plaintiff's requisitions for payments on account, and in the complete and indefinite stoppage of plaintiff's work under the circumstances mentioned, defendant had committed breaches of the contract so material as to amount to a total breach, justifying plaintiff in declining to proceed further and in suing at once for its damages. See *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 552. But as we pointed out in 240 U. S. 283, plaintiff counted also upon a *quantum meruit* for work and labor performed and materials furnished in and about the construction of the building.

The Circuit Court of Appeals attributed error to the trial court in the following respects:

(1) The trial court refused defendant's request to instruct the jury that plaintiff was not justified in terminating the contract because of delays, and in instructing them on the contrary, as the court did in substance, that if it was evident to the parties on May 22, 1912, that there would be a long delay or an indefinite delay, or if it was evidently impossible to tell when the work could be begun again, plaintiff had a right to terminate the contract and was not obliged to await indefinitely the pleasure of the Government as to the resumption of work. It should be noted that when plaintiff took action to terminate the contract, more than two months already had elapsed since the work was stopped. This was undisputed, and of course must be considered in dealing with the instruction referred to.

It is sufficiently obvious that a contract for the construction of a building, even in the absence of an express stipulation upon the subject, implies as an essential condition that a site shall be furnished upon which the structure may be erected. In this case the matter was not allowed to rest upon an implication, for, as we held in our former opinion, the 11th paragraph of the sub-contract, providing: "The general contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the sub-contractor, agree that they will reimburse the sub-contractor for such loss," as applied to the facts of the case, imported an agreement by defendant to furnish the foundation in such manner that plaintiff might build upon it without delay, and was inconsistent with an implication that the parties intended that delays attributable to the action of the owner should leave plaintiff remediless; and defendant's obligation to furnish a suitable foundation was not dependent on whether it was at fault or whether the delay was attributable to a stoppage of work by the owner in the exercise of a right con-

ferred upon it by a provision of the principal contract which was not brought into the sub-contract.

The Circuit Court of Appeals, however, held (241 Fed. Rep. 549) that although under paragraph 11 defendant would be liable to respond in damages for such delays if plaintiff completed or stood ready to complete its contract, yet it did not follow that if plaintiff was delayed in completing its work within the 300 days specified in paragraph 6 it could decline to go on, since by paragraph 7 it was provided that should the sub-contractor be obstructed or delayed in the prosecution or completion of the work by neglect, delay, or default of the owner (among other causes), the time fixed for the completion of the work should be extended for a period equivalent to the time lost from such causes. The court held that this rendered it clear that delays occasioned to the plaintiff by the owner, the general contractor, etc., were not to excuse plaintiff from proceeding to complete the contract, but were to operate merely as an extension of the time within which by the terms of the contract plaintiff was required to perform its work. In our opinion there was error in holding that the provisions of the 6th and 7th paragraphs limited, thus, the provisions of the 11th. From the fact that by paragraph 6 plaintiff was obliged to finish the work in 300 days, and by paragraph 7 this time was extended for plaintiff's benefit in the case of delays caused by the owner, the general contractor, or otherwise as specified, it does not follow that plaintiff was not entitled to finish the work more speedily if it could do so; or that a breach of paragraph 11 by defendant, so serious as to result in a total suspension of the work, with no reasonable prospect that it could be resumed within any reasonable time, left plaintiff still under an obligation to hold itself in readiness to proceed, and without remedy except an action for damages under that paragraph.

(2) The court found error in the admission of evidence tending to show that at the time plaintiff ceased work it had on hand and left upon the premises certain materials, machinery and tools of the value of $3,500, which defendant took and appropriated to its own use. As pointed out above, the complaint contained a general claim in the nature of a *quantum meruit* for labor performed and materials furnished. The particular item in question was specified in the bill of particulars. This clearly justified the trial court in admitting the evidence over the only substantial objection made, which was that it was immaterial and not within the pleadings. There is nothing to show that it was admitted only for its bearing upon the question of damages for breach of the special contract. It is true that in answer to the objection of immateriality plaintiff's counsel said: "I will show you a case where it says that the rule is that the plaintiff's expenditure minus any materials which he may have on hand and plus any profits which he might have made"—evidently referring to *United States* v. *Behan*, 110 U. S. 338, 344, 346; but in responding to a further objection that the material could not be charged to defendant, plaintiff's counsel insisted: "I propose to show that the defendant took it and has it," and followed it up with proof to this effect.

The opinion of the Circuit Court of Appeals (241 Fed. Rep. 550) shows that counsel for plaintiff in that court stated that the *quantum meruit* had been disregarded, and that the trial proceeded solely upon the ground of a breach of the special contract; but the bill of exceptions fails to bear this out, and error can not be attributed to the trial court on that theory. There was no waiver of the general claim for materials, and the evidence referred to furnished a ground of recovery upon that claim, irrespective of plaintiff's right to recover damages for breach of the special contract.

But upon the latter question also it was admissible,

upon the assumption that the rule of damages laid down in *United States* v. *Behan*, *supra*, was applicable, which is not disputed. That rule would give the plaintiff a right to recover what it had expended toward performance of the contract, subject to a deduction for the value of the materials remaining on hand at the time performance was stopped. But of course the deduction is based upon the theory that those materials remained the property of plaintiff and subject to its disposal. If they were appropriated by defendant to its use—and this is what the evidence tended to show—it is plain that their value should not be deducted from, but should be treated as a part of, plaintiff's contribution to the performance of the contract, in addition to its other outlay in respect of work performed.

The Circuit Court of Appeals considered that the furnishing of the materials in question was a matter so entirely outside of the contract that it could not properly be considered as an element of damage for its breach, and that plaintiff's remedy to recover their value must be by action of tort for conversion. But the evidence showed no tortious conversion; it tended to show that the articles were appropriated by defendant with plaintiff's consent; and it hardly is necessary to say that, if tort there were, plaintiff could waive it and sue upon the implied assumpsit. *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 598; *Hirsch* v. *Leatherbee Lumber Co.*, 69 N. J. L. 509, 513.

Nor was this a matter entirely outside of the contract. The materials in question consisted in the main of tools and appliances that had been brought to the building by plaintiff for use in the performance of the contract, were so used, presumably were fitted for further use on the building, and upon the interruption of the work were left in position in the control of defendant and ready to be employed by it whenever it should proceed with the

work that plaintiff had been prevented from doing. If they were accepted and retained by defendant, as the evidence tended to show was the fact, it was proper to take them into account as a part of plaintiff's expenditures upon which the damages caused by defendant's breach of the contract were to be computed.

(3) The next ground of error upon which the Circuit Court of Appeals based its decision was an instruction given to the jury, in substance, that if defendant failed to make payments on account as called for by the contract,—"a substantial failure, amounting substantially to the withholding of the whole payment, not necessarily the whole payment, but the bulk of the payment"—such failure constituted a breach on the part of defendant justifying plaintiff in stopping work and entitling it to recover damages from defendant; and the refusal of a requested instruction to the effect that "The delay of defendant to make payments on estimates, in the absence of a positive refusal to pay anything, was not ground for a rescission or termination of the contract by plaintiff," and that plaintiff's remedy was to recover interest on the deferred payments.

The Circuit Court of Appeals very properly held that in a building or construction contract like the one in question, calling for the performing of labor and furnishing of materials covering a long period of time and involving large expenditures, a stipulation for payments on account to be made from time to time during the progress of the work must be deemed so material that a substantial failure to pay would justify the contractor in declining to proceed. In addition to the provisions of paragraph 12, already referred to, the concluding paragraph of the contract was as follows: "And the said general contractors hereby promise and agree with the said sub-contractor to employ, and do hereby employ him to provide the materials and to do the said work according to the terms

and conditions herein contained and referred to for the price aforesaid, and hereby contract to pay the same at the time, in the manner and upon the conditions above set forth." As is usually the case with building contracts, it evidently was in the contemplation of the parties that the contractor could not be expected to finance the operation to completion without receiving the stipulated payments on account as the work progressed. In such cases a substantial compliance as to advance payments is a condition precedent to the contractor's obligation to proceed. *Canal Co.* v. *Gordon*, 6 Wall. 561, 569; *Phillips Construction Co.* v. *Seymour*, 91 U. S. 646, 649.

But it was held that defendant's refusal to pay was justified because plaintiff's requisitions were not made out in accordance with the provisions of the contract. There were but two requisitions in evidence, one dated December 30, 1911, the other March 9, 1912. Both were held defective, in that they included not only 85 per cent. of the estimated amount of the concrete construction, which was the principal subject-matter of plaintiff's contract, but also a like percentage of the amount earned in setting granite under the accepted option in paragraph 25. The court held that the provision for monthly instalments related only to the former, and that as to the granite work plaintiff was not entitled to payments on account in advance of its completion. In our opinion, however, defendant's acceptance of the option to call upon plaintiff to set the granite blocks did not make a separate contract, but merely added something to the work that plaintiff was to do under the contract previously made; and by necessary inference it subjected the granite setting to the appropriate general provisions respecting the method of performance and the time when the work was to be paid for.

Were it otherwise, the requisition of March 9 could not be rejected merely on the ground that it called for a pay-

ment for granite work. We say this because there was clear evidence—apparently uncontradicted, and at least sufficient to go to the jury—tending to show that the granite setting was substantially completed by the early part of February, and that because the few blocks remaining to be set were arriving intermittently and could be set only at unreasonable cost, it was then at plaintiff's request agreed by defendant that plaintiff should set no more granite. This part of the work was thus brought to a close, or so the jury might find; in which event, if it constituted a separate contract, payable at completion, as the Circuit Court of Appeals held, plaintiff on March 9th was entitled to demand not only 85 per cent., but the entire amount due for granite setting.

(4) The court held the requisition of March 9 to be defective upon the further ground that it was based upon the unit price of $1.07 per cubic foot, pursuant to the understanding said to have been arrived at between the parties on February 2, instead of the actual cost of the work erected in the building as required by paragraph 12 of the contract. It was held that since the complaint alleged that plaintiff's demands for payment were made "in accordance with the terms of the contract," evidence to show the agreement made on February 2 about unit prices was not admissible without an amendment of the complaint setting up a modification of the contract.

This view cannot be upheld. The allegation quoted from the complaint did but touch upon the performance of a condition precedent, concerning which the former niceties of pleading no longer obtain. And besides, evidence of the agreement of February 2 about unit prices was introduced at the first trial and was particularly referred to in our opinion reviewing it (240 U. S. 273–274); and the requisition of March 9, then as now relied upon by plaintiff, was excluded from consideration by us only because such details as were then furnished did not appear

to bear out the estimate contained in it as to the amount of work that had been completed (240 U. S. 282), an omission that was supplied at the second trial. As the case went back for further proceedings in conformity with that opinion, the trial court doubtless considered that compliance with our mandate required the admission of the testimony as to the agreement of February 2, which furnished the basis of the requisition of March 9, and that no amendment of the pleadings was necessary. Were there doubt about this, we should deem it proper that the complaint be amended, or treated as if amended, even in the appellate court, rather than that the judgment should be reversed for so unimportant a variance, not in the least prejudicial to defendant.

(5) The final ground upon which the reversal was rested was an instruction given by the trial court to the jury upon the question of damages in the following terms: "If you find he [meaning plaintiff] was justified in terminating the contract as he did on May 22 upon the principles above given you, you can consider the reasonable expenditures incurred by the plaintiff, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract. So the different items that you may, if you come to the question, take into account, are the outlays less the material on hand, the amount of work actually performed and the profits, if you find there were any which were not speculative. The measure of profits is the contract price less what is shown to you as the expense of carrying out the contract, if that is shown to you to your satisfaction." The appellate court held this instruction to be misleading because it embodied a duplication of elements. Respecting this a difficult question would be presented if defendant were

in a position to raise it. When the case was here before, we assumed (240 U. S. 282, 283) that an instruction similarly phrased ought to have been granted at plaintiff's request had it been confined in its application to a recovery based upon a finding that the contract was rightfully terminated by the notice of May 22, 1912; but, this was an assumption *arguendo*, and not a part of the matter decided.

At the second trial this part of the charge was given by the court of its own motion, not at plaintiff's request; nor was it excepted to by defendant. The statement of the Circuit Court of Appeals to the contrary (241 Fed. Rep. 555) is not borne out by the record. The proposition criticized is not contained in any of the instructions requested by plaintiff; and even had it been requested there is no exception touching it unless it be the following: "I will ask on behalf of the defendant an exception . . . to the action of his Honor . . . in giving all instructions requested by plaintiff." This is altogether too general to be regarded as directing the mind of the trial court to any single and precise point of alleged error so as to call for a reconsideration of the ruling, and hence could not furnish a basis for reversing the judgment. That an exception must be specific need not be emphasized. *McDermott* v. *Severe*, 202 U. S. 600, 610; *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 529.

There was another exception, couched in these terms: "To that part of the charge to the effect that if the plaintiff had the right to terminate the contract under the authority of the *Behan case*, the measure of damages would be not only the expenses incurred by the plaintiff, but also reasonable profits." This, however, refers to another passage in which the trial court quoted from the headnote in 110 U. S. 338. This clause contained no reference to the amount of work performed or what plaintiff was entitled to by reason of this work at the contract

price; it mentioned only (a) plaintiff's outlay, and (b) the lost profits, embodied no duplication of elements, and was not erroneous.

Having found that none of the grounds relied upon by the Circuit Court of Appeals for reversal of the judgment of the trial court is tenable, it remains to consider what judgment ought to have been rendered upon the record and bill of exceptions, in view of the assignments of error other than those we have thus far considered. *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 528. There were 101 assignments in all, and these have been examined with the aid of respondent's brief, which extends to 250 pages, in addition to the oral argument; but we have found no ground for reversing the judgment of the trial court.

Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed.